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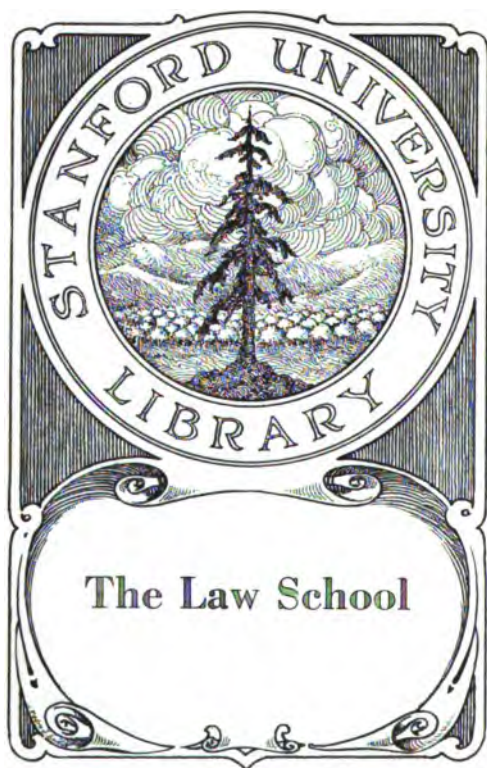
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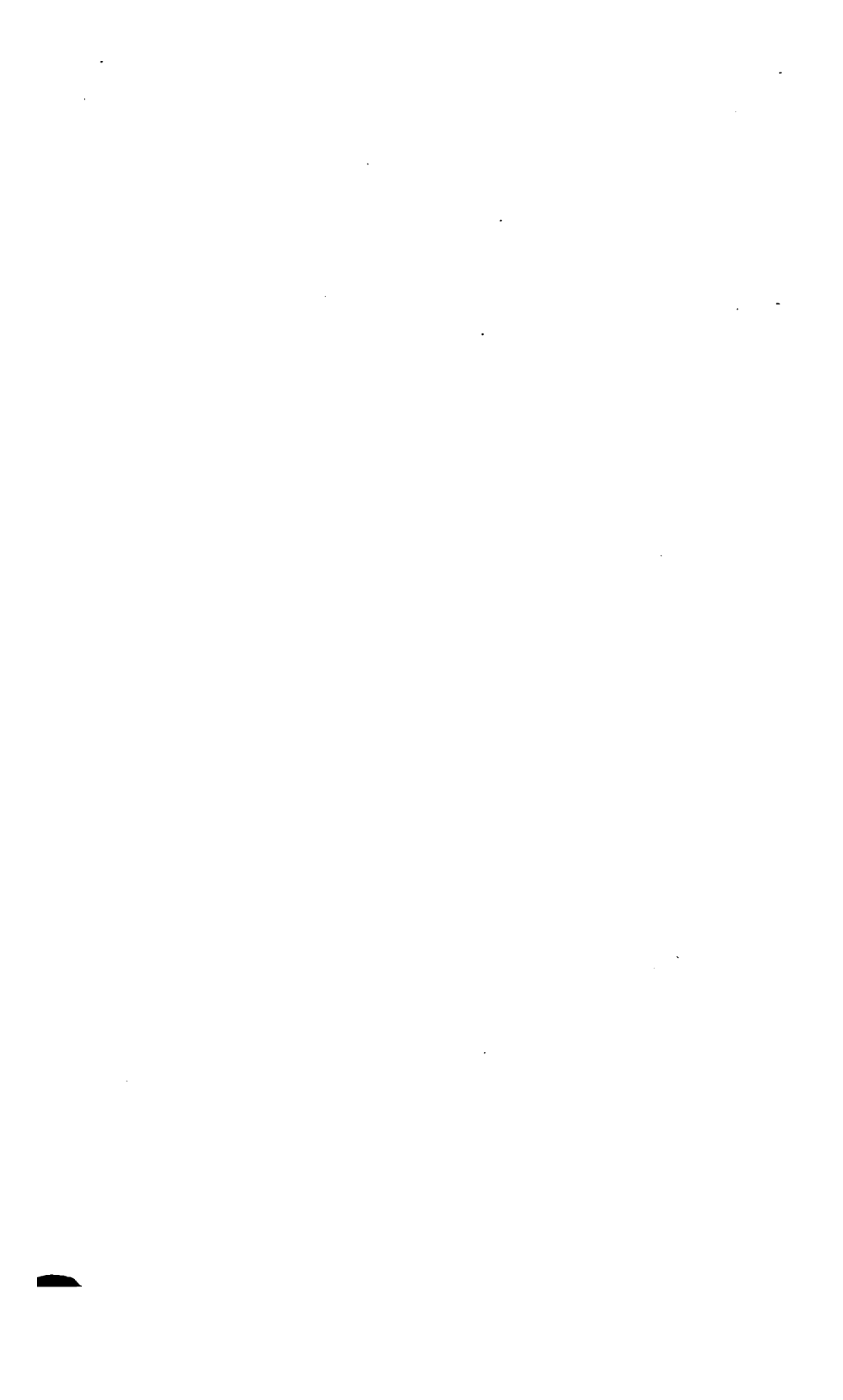
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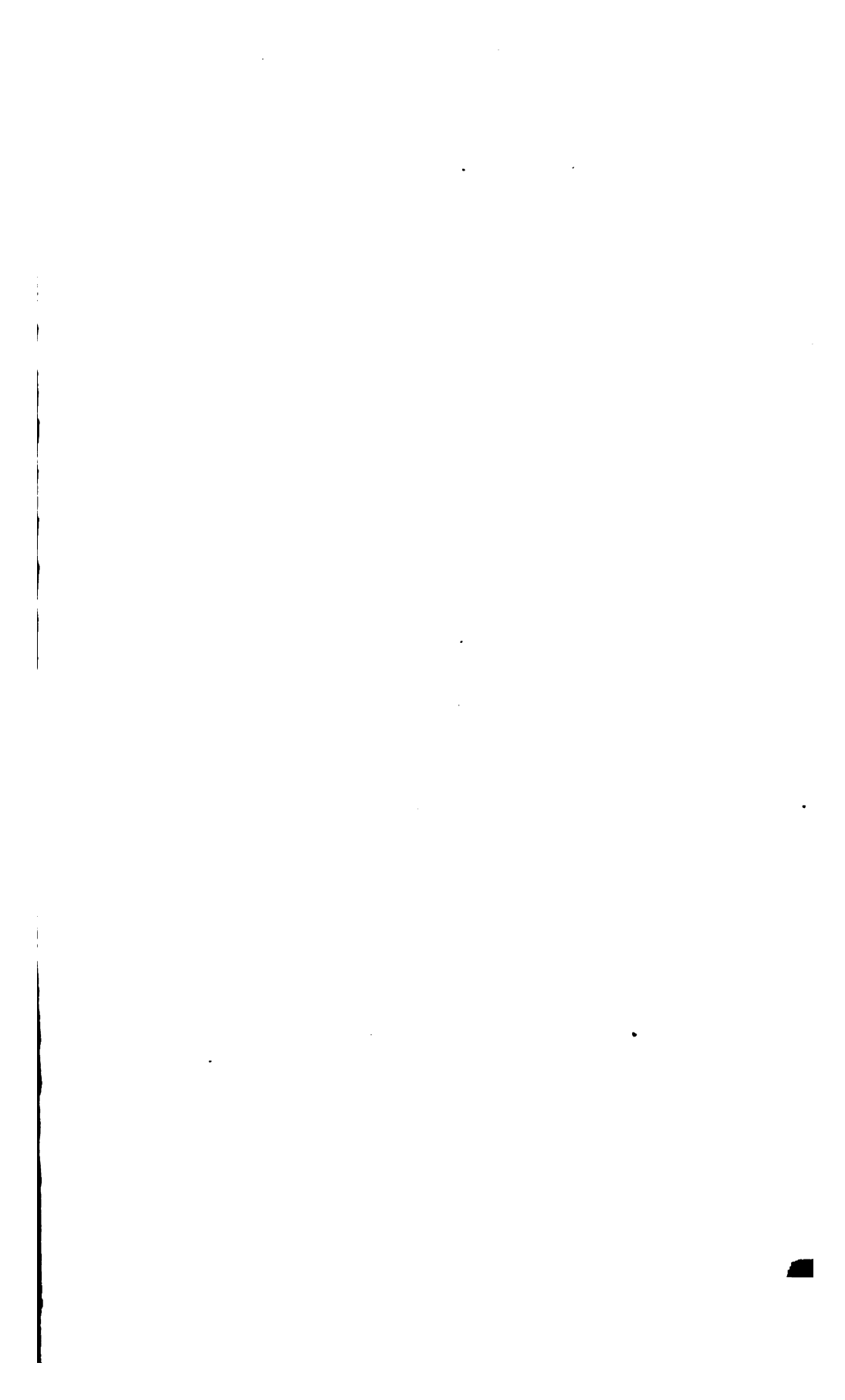
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Ecclesiastical Courts
AT
Doctors' Commons;
AND IN THE
HIGH COURT OF DELEGATES.

By **JOSEPH PHILLIMORE, LL.D.**
ADVOCATE IN DOCTORS' COMMONS, CHANCELLOR OF THE DIOCESE OF OXFORD,
AND REGIUS PROFESSOR OF CIVIL LAW IN THE UNIVERSITY OF OXFORD.

*Sic unum quidquid paulatim protrahit ætas
In medium, Ratioque in luminis eruit oras*

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VOL. II.

CONTAINING CASES FROM HILARY TERM, 1812,
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E R R A T A.

- Page 5, note, line 7, for "a" read *on*.
17, line 22, for "Sagden" read *Sugden*.
33, — 8, for "Tareham" read *Fareham*.
— dele twenty-seventh and twenty-eighth lines.
102, in marginal note, line 8, insert *not*.
145, ——— for "executive" read *exceptive*.
265, line 9, for "decepiisset" read *decessisset*.
295, — 7, for "1815" read 1813.
398, — 32, for "1793" read 1813.



REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

Dockers Commons;

AND IN THE

HIGH COURT OF DELEGATES.

CONSISTORY COURT OF LONDON.

WHINFIELD, by his Attorney, v. WATKINS.

1812.
Hilary
Term,
January 31.

THIS suit was instituted by Mr. John Skinner, the attorney of the Reverend William Whinfield, vicar of the vicarages of Ramsay and Dover Court, with the chapelry of Harwich, against George Watkins, the receiver of the tithes, and other emoluments of the said vicarages, in virtue of a sequestration issued under the seal of the Consistorial Court of London.

The sequestrator of a benefice is bound to repair the vicarage-house, and buildings; and liable for dilapidations in the Bishop's Court.

The libel pleaded, that the Rev. W. Cowper was on the 3d of Feb. 1786, lawfully instituted and inducted into the vicarages of Ramsay and Dover

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v.
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Court, with the chapelry of Harwich; and continued in possession of them till his death, which happened on the 26th of Nov. 1809:—that from time immemorial a vicarage-house with offices, and premises at Ramsay, and a farm-house and out-houses at Dover court, have belonged to the said vicarages, and a small house situated at Harwich has belonged to the chapelry of Harwich; and that the Rev. W. Cowper held and possessed the same, during his incumbency.

That on the 29th of July, 1805, a sequestration of these benefices was granted to George Watkins, in virtue of which, he from that time, till the death of the Rev. W. Cowper, received all the tithes of profits arising from them:—that the said tithes and profits have been more than sufficient to defray the expences of repairing the dilapidations of the vicarage houses, farm-house, &c.:—and that George Watkins is by law obliged to repair the said dilapidations.

That, during the incumbency of William Cowper, and at the time of his death, the said vicarage-houses, and other buildings, were in a very ruinous condition; and stood in need of very many reparations:—that to amend and repair them will, on the most moderate computation, amount to the sum of 565*l.* 3*s.* 6*d.*

That George Watkins has been asked, and requested by the Rev. W. Whinfield, or some person on his behalf, to repair the dilapidations aforesaid; but has refused, and still continues to refuse so to do.

The libel concluded by praying that George Watkins might be compelled to pay the costs

and charges of the repairs of the said dilapidations, according to a schedule and estimate which were annexed to the plea.

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Arnold against the admission of the libel.

The act of sequestration appears here in the ordinary form, under the king's writ,—the process issues for the purpose of the payment of debts,—the common law takes cognizance of these matters, as appears from Degge: (a) if so, it must be held that debts shall be preferred to dilapidations;—

(a) Suits for dilapidations are most properly and naturally to be sued in the Spiritual Courts; and, if any prohibition should be granted, the same ought to be superseded by a consultation; but this is intended where the suit is grounded on the Canon Law. But the successor may, upon the custom of England, have especial action upon the case against the dilapidator, his executors, or administrators, whereof there are multitudes of precedents, even in the times of Popery. See Degge's Parson's Counsellor, p. 94.

The editor of Degge, (for, from the statement of the case, it cannot be Degge himself,) says that there is much curious learning on this subject in 3 Levins, p. 268. The case referred to for this curious learning is, that of *Jones v. Hill*, K. B. 1 W. & M.: it was an action brought by a parson against his predecessor for dilapidations;—the declaration stated, that the defendant being parson, had accepted another benefice, and left the houses out of repair; that, by the custom of the realm in such a case, he was bound to pay to his successor so much money as was sufficient for the repairs. After a verdict for the plaintiff, an arrest of judgment was moved, on the ground, that the action did not lie. And of this opinion was Pollexfen, Chief Justice, who tried the cause at Warwick Assizes; and in the same opinion he continued, for he said the cause was only suable in the Ecclesiastical Court. In support of the action

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the sequestrator, therefore, being liable to satisfy the debts before he repairs the dilapidations, it is incumbent on the party proceeding to shew not only that he has received sufficient for the dilapidation, but also sufficient in the first instance to satisfy the debt; the case of *Hubbard v. Beckford* will probably be cited; but in that case (b) the Court found by the account, that there was a surplus in the hands of the sequestrator; and therefore held him liable.

Besides, in the process of sequestration, it is recited, that previous sequestrations of the same kind had issued; the party proceeded against was only four years in possession of the sequestration; some of the former claims may be still subsisting;—the dilapidations are pleaded generally, to have

Degge's Parsons Law was cited, Part 1. c. 8. p. 79. where he says that many such actions have been maintained, and cites Hill. 18 H. 8. Rot. 306. Hill. 15 Jac. 1. Rot. 474. Mich. 12 H. 8. Rot. 730. But on search of the Rolls no judgment was had in any of the said cases, but in some of them a verdict and divers continuencies entered. But in the case of *Day v Hollington*, Mich. 3 Jac. 2. C. B. Rot. 39. in a similar case judgment was given for the plaintiff on a demurrer.

The Court, however, inclined to the opinion of the Chief Justice Pollexfen; but the cause was put on the paper to be further argued: afterwards in Trinity Term, Pollexfen and Ventris being dead, the cause was again argued before Powell and Rooksby, Justices, and they gave judgment for the plaintiff.

Levins was himself counsel for the plaintiff.

See also the case of *Okes v. Ange*, 5 W. & M. in B. R. where a prohibition was granted, because the party suing in the Ecclesiastical Court had already recovered dilapidations in the same case in the Temporal Court. Levins 3. 413.

(b) *Hubbard v. Beckford*, Consist. 1798.

been incurred during the incumbency of the late vicar ; may they not have occurred during the possession of the present sequestrator ?—The last sequestrator cannot be held liable for all the charges of this description, when he received his sequestration without prejudice to the former sequestrators.

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There is another objection, which applies to form, rather than to substance ;—the suit is brought by the attorney of the present incumbent,—the incumbent himself being abroad. In a libel, we apprehend, the party is bound fully to set forth the title under which he can recover ;—here the party acting has no title of his own ; and, therefore, he is compellable to exhibit the authority under which he acts.

Swabey, contra.

The incumbent has not only named an attorney, but has also appointed him by special proxy ; when a party sues by attorney, he is bound to produce the letter of attorney ;—but I know of no case where the power has been required to be strictly pleaded.

In the case of *Hubbard v. Beckford (a)*, it did

(a) *Hubbard v. Beckford*, Cons.

JUDGMENT.

PER CURIAM.

This is an allegation in a cause of dilapidations against the sequestrator of the rectory of Shepperton. A libel has been given in, and this allegation is in answer to it.

It is objected to on principle—I shall however admit it—it appears that great part of it is merely introductory of the circumstances of the sequestrator, which it is proper the Court should have before it—it is right that the sequestrator should, in all cases, give an account to the ordinary : and though this account

1798.
Trinity
Term.
July 30.

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 WATKINS.

indeed appear, that there was some surplus in the hands of the sequestrator ; but the Court said ge-

is stated, to have been given in another cause, it may be introduced in this as an exhibit. I shall admit the allegation ; but I propose to throw out a general idea of the cause to direct the parties. It is stated that there is no great difference between the demand, and the sum which the parties are ready to pay. I am inclined to hold that the sequestrator will be liable for the dilapidations. The bishop's writ directs the sequestrator to levy certain sums for the payment of debts. The writ is mandatory ; the sequestrator is only ministerial—he levies by sequestration—the sequestrator is a kind of bailiff to the bishop :—the writ mentions only money to be raised for debt. But incident to and inseparable from the nature of the thing, it is, that the sequestrator shall attend to certain points. The writ expresses that he shall supply the Church with Divine offices ; and that all other charges and duties shall be sustained, and that he shall render an account to the bishop. It is the duty of the sequestrator to provide all the necessary charges of the church : and I know not on what principle it is to be contended that the repair of part of the church belonging to the rectory, and of the parsonage house, are not duties to which the living is liable. The incumbent is as much subject to these as to provide divine worship—he is compellable to the one, as to the other ; and subject to the same penalties for the neglect of them : he cannot exonerate himself from them by any private contract, or transfer the benefice discharged of them.

A creditor is usually preferred ; but this is merely for the convenience of the bishop, for he has no right to it ; it may be granted to the churchwardens, or to any person in the discretion of the bishop. If a creditor takes it, he has no greater advantage, or other right, than any other sequestrator, who would have to pay over to him what he received after providing for other duties, and not to give himself the preference. It is not asserted that the sequestrator is not bound to repair, for he pleads that he has repaired, and states the sum which he has expended on the repairs.

nerally, that it was inclined to hold a sequestrator liable for dilapidations ;—the writ mentions nothing but the debt ; but it is inseparable from it, that there should be charges over and above the debt which is to be recovered :—the repairs of the vicarage and buildings are a necessary charge ;—a creditor has no greater advantage than another sequestrator : he must accept it as another sequestrator :—as to the preference of debts over dilapidations, that can only be in the event of the death of the incumbent.

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With respect to the prior sequestrations ;—I apprehend all the sequestrators were bound in the same way ; this can make no difference with respect to the present sequestrator—it was not till these first debts were satisfied, that the present sequestrator had any demand :—it is a charge upon the living itself : the former sequestrators were to look to it, and might have held on the sequestration till the charges were satisfied.

Per Curiam.

Let the power of attorney be produced on the next Court day ; the inclination of my opinion is to admit the libel.

I am of opinion that the sequestrator is liable, in the first place ; and that he is entitled for payment of his debt to the sum that remains. I consider these charges as necessary duties incident to the office, though not expressly mentioned in the writ of the bishop ; yet legally contained therein, and not to be separated from it, even by the authority of the bishop himself.

1812.

*Hilary**Term,**Feb. 7.*

WHINFIELD

v.

WATKINS.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a libel given in by the attorney of the vicar of Ramsay and Dover Court against the Rev. R. Watkins, the sequestrator of that living. The sequestration issued in 1805 to George Watkins; and the libel states that he has received more than sufficient from the profits of the living to repair the vicarage-house and buildings; and that he is bound to repair them. The libel, therefore, is taken out against him, as a person acting under a sequestration; and I am willing to admit that the sequestrator is bound to repair edifices belonging to the benefice; and that there can be no doubt that he may be compelled to do so by a process from the Bishop's Court. The repair of the church is as necessary a charge as the supply of the church itself:—he may therefore be compelled by the bishop and churchwardens to make the repairs:—nothing would exonerate him from them.

But I do not undertake to say that he may not plead circumstances which may exonerate him from this obligation, as far as the authority of this Court goes. If he can shew that the sequestration has been finished, and determined, and that the accounts have been made up, he may not be liable here:—he may be liable elsewhere:—but it does not seem to me that this Court can interfere after his sequestration has closed, and his connection with the living has ceased.

He is described as sequestrator; therefore, on the face of the statement he appears liable.

I shall admit the libel as it is reformed :—it will be open to the party proceeded against, to counter-plead to it.

1812.
WEINFELD
v.
WATKINS.

I entertain, however, considerable doubts, if it shall be shewn that the sequestration has been entirely determined, with respect to the liability of a person, whose connection with this Court has ceased.

1812.
Hilary
Term,
Feb. 2.

CONSISTORY COURT OF LONDON.

GREENSTREET, falsely called CUMYNS *v.* CUMYNS.

A marriage
 annulled on
 account of
 the impo-
 tency of the
 husband.

MARIA Greenstreet was married to the Rev. Robert Heysham Cumyns, on the 26th of July, 1807 ; —the present suit was instituted by her in Nov. 1809, to annul that marriage, on the ground of the impotency of her husband. A libel was given in alleging his incapacity to consummate the marriage ;—and the husband admitted this fact in his answers. There was in evidence also, the report of two physicians, and two surgeons, who had been duly appointed, and sworn to inspect the person of the husband ; which stated in substance, that though the disease, and imperfection of the parts, was not such as to imply impotency to the execution of their functions ;—yet that, having heard his own accurate history of his alleged impotence, they put faith in his account ; and as he was in good health, they could hold out no hopes of his impotence being remedied by any medical treatment.

Arnold and Jenner for the wife.

Swabey, contra.

JUDGMENT.

SIR WILLIAM SCOTT.

I think there is enough to satisfy the Court that at the time this marriage took place, there was incompetency to perform the duties which the

marriage contract enjoins, and which were necessary to render it valid.

The fact is sufficiently established;—and also that there is no collusion between the parties.

There is an air of truth in the evidence; and a great disposition, on the part of the husband, to atone for the injury he has inflicted on this lady; being in utter ignorance himself of his constitutional defects. It appears that he was incapable at the time of marriage, and has continued so ever since;—and I pronounce for the nullity.

1812.
Hilary
Term.

GREEN-
STREET
v.
CUMYNS.

MAYHEW v. MAYHEW.

Easter
Term,
April 17.

CHARLES Mayhew instituted proceedings against his wife for adultery:—the libel pleaded that the parties intermarried together on the 4th. of Sept. 1806. The wife appeared by her proctor; and admitted in acts of Court, that a marriage did in fact, though illegally, take place between the parties in the cause;—but otherwise contested the suit negatively.

Nullity of marriage being asserted in answer to a libel, charging adultery, the question of nullity is first to be disposed of.

Swabey for the husband.

Prayed an assignation on the proctor for the wife, to plead the illegality of the marriage.

Stoddart, contra, contended, that the husband must first prove his libel.

1812.
Easter
Term.
MAYHEW
v.
MAYHEW.

Per Curiam.

I think the preliminary question of the legality or illegality of the marriage must be decided, before the husband is put to the expence of examining witnesses on his libel.

Trinity
Term.
June 9.

An allegation was offered to the Court on the part of the wife ;—it was of considerable length ; but the facts principally relied upon to establish the nullity were, that she was described in the publication of banns as Sarah Kelso, widow ;—whereas she was in fact Sarah White, spinster ;—both parties were above twenty-one years of age at the time of the solemnization of the marriage.

JUDGMENT.

SIR WILLIAM SCOTT.

This allegation travels into history, which I do not think important. I wish more attention had been paid to the relevancy of the matter pleaded. It recites the marriage act ; and states that the woman, the daughter of Thomas and Sarah White, was baptized by the name of Sarah ;—that her parents died when she was about three years old :—that she then went to Northumberland, thence to Denmark, and afterwards to the East Indies ;—and is the Court to go into all this history ? It would lead to a monstrous mass of evidence, which, after all, would be totally irrelevant : the only question being, whether she was duly married under the publication of banns as “Sarah Kelso, widow.” The allegation states, that she made Mayhew acquainted with her real situation ;—that she ex-

plained to him that she was not a widow, but a spinster:—and that her real name was Sarah White, and not Sarah Kelso:—and then proceeds to assert that the publication of the banns was directed by the man to be in the name of Kelso, that he might avoid the marriage at a future time.—I am of opinion, that such a publication would not affect the validity of the marriage:—on whom would be the fraud? not on the man,—he knew all the facts, and all the circumstances; and might think this the most proper name to be used. She had used many names; he might have doubts as to what she ought to be called—on whom else could there be fraud? the woman was a major:—different from a case where the parents' rights would be invaded:—no fraud can possibly be suggested against any one. The act of Parliament does not require a description of the party.

I am of opinion, that if this allegation were proved, it would not dissolve a marriage which took place under such circumstances. (a)

Allegation rejected.

(a) The case of adultery being substantiated against the wife, the Court gave sentence in favour of the husband, and decreed a separation *à mens et toro*, Mich. Term, Dec. 14, 1813.

1812.
Easter
Term.
MAYHEW
v.
MAYHEW.

1812.
Easter
Term,
 May 29.

TREE v. QUIN.

A libel in a suit for nullity of marriage admitted, so far as it pleaded that banns were published under an additional Christian name which did not belong to the woman; but rejected as to that part, which stated the non-residence of the parties in the parish, where they were married.

THIS suit was instituted by a father, to set aside the clandestine marriage of his daughter, who was a minor. The libel pleaded, that she was baptized by the name of Martha only, and was known by that name, and *by no other Christian name whatever amongst her relations and friends, whereas the banns were published under the names of Martha Caroline.* And also, "*that neither she, nor her husband, were inhabitants of the parish in the church of which they were married; or had any house, lodging, or usual place of abode therein.*"

Edwards against the admission of the libel.

The whole is inadmissible; but especially that part which states, that the parties were not resident in the parish in which they were married:—for the act of parliament (a) directs, that no evidence touching the residence shall be gone into after a marriage has been solemnized.

(a) Provided always that, after the solemnization of any marriage, under a publication of banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or, where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of four weeks as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage.

26 Geo. 2. c. 33.

Swabey contra.

The non-residence is not pleaded as of itself, inducing a nullity:—but as a circumstance to shew the contrivance and clandestine conduct of the parties.

Per Curiam.

If I admit the libel, I think I must exclude that part of it which pleads that the parties did not reside in the parish in which the banns were published.

I shall admit the remainder without determining the law of the case, till I see what is proved;—but let the cause stand over till the next Court.

JUDGMENT.

Sir WILLIAM SCOTT.

I think the words of the act are so strong as to bind the Court not to admit the article respecting the residence. The libel must be reformed as to that article, and admitted. (*b*)

(*b*) The libel was admitted to proof as reformed; but no witnesses have been hitherto produced, nor have any further proceedings been had in the cause.

1812.

*Easter
Term.*

FREE

v.

QUIN.

Trinity

Term.

June 9.

PREROGATIVE COURT OF CANTERBURY.

1812.
June 13.

ELLIOTT and SUGDEN v. GURR.

A voidable marriage cannot be rendered void, after the death of either of the parties.

JUDGMENT.

Sir JOHN NICHOLL.

Sarah Lester, otherwise Gurr, died intestate in July 1796 :—a marriage had been solemnized in 1787, between the deceased then a widow, and William Gurr then a bachelor, in the regular form. William Gurr survived his wife, but did not take out an administration to her effects. In 1812 a decree was taken out against him, to show cause why administration should not be granted to John Elliott, and Elizabeth Sugden, the brother and sister of the deceased : the suggestion being, that the marriage was incestuous and void to all intents and purposes, and, therefore, that, the deceased did not die the wife of William Gurr, but the widow of her former husband, Abraham Lester ;—and the question is, whether Sarah Lester is to be considered as dying the wife of William Gurr, or as dying a widow.

The question appears rather a strange one to be brought before the Court ; and it is brought in a strange manner : the decree issued at the suit of John Elliott, and Elizabeth Sugden, in these terms, "*Whereas Sarah Lester, otherwise Gurr, late of Chatham in the county of Kent, deceased, departed this life in the month of July, 1796, in-*

"testate, without having made any will, having at the time of her death goods, chattels, and credits in divers dioceses, or jurisdictions sufficient to form the jurisdiction of our said Prerogative Court of Canterbury; and that in the month of Nov. 1771, the said Sarah Lester, being then a spinster, intermarried with Abraham Lester, who afterwards died in her lifetime, whereby she became his lawful widow and relict,—that some time after, to wit, in June 1787, a marriage, or rather a profanation of a marriage, was had between the said Sarah Lester, and William Gurr, the lawful sister's son of the said Abraham Lester, deceased; whilst living the legal husband of the said Sarah Lester, by reason whereof, the marriage so had between her and the said William Gurr was, and is incestuous, illegal, and null, and void to all intents and purposes in law whatsoever; and, therefore, it was alleged, that the said Sarah Lester, otherwise Gurr, died a widow, without child, or parent, leaving behind her the said John Elliott, and Elizabeth Sagden, her natural and lawful brother and sister, and only surviving next of kin."

1812.
Easter
Term.
ELLIOTT
v.
GURR.

I wish to know whether there is any precedent for such a decree;—I have asked the counsel, who supported the decree, whether they could show any authority for a next of kin obtaining an administration in exclusion of a husband or a wife so married:—no authority has been cited. If consulted, the Court would not have allowed such a decree to have issued; for, on the face of it, it asserts that which, for reasons which I shall presently assign, is

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Term.
{
ELLIOTT
v.
GURR.

not law. I desire in future that no decree of a novel kind may issue without either being consulted in *camera*, or moved in Court by counsel. It is of consequence, because the instruments of the Court are generally presumed to be declaratory of the law of the Court.

The proceedings on the part of the husband are equally strange. He appears,—and instead of asserting his right to the administration as husband, and praying to be heard on petition,—in form of a protest or otherwise;—he gives an allegation pleading the fact of marriage.—The fact of marriage is admitted in the decree; so that it was unnecessary to plead it:—but it is pleaded simply;—omitting indeed the words free from impediment, but still not so as to raise the question, for that clause is not absolutely necessary.—It is to be presumed all the essentials are pleaded;—no person could infer from that clause being omitted, that there existed a previous impediment by reason of affinity.

The court will not withhold its opinion, as it is the object of the parties to obtain it,—and I am unwilling to throw upon them any unnecessary expence;—at the same time I must express some surprise that such a question should be made at this time of day; for any one might as well question the most established rules of the Court.

The marriage was within the prohibited degrees; for the husband was the sister's son of the woman's former husband, that is, her nephew by affinity;—but the marriage was not declared void in the lifetime of the parties. Now, the difference between

void, and voidable, is so clear, that no person who ever looked into any elementary book on the subject, is ignorant of it. The canonical disabilities, such as consanguinity,—affinity,—and certain corporal infirmities, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained :—and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties.

Civil disabilities, such as a prior marriage,—want of age,—idiocy, and the like, make the contract void *ab initio*, not merely voidable :—these do not dissolve a contract already made ;—but they render the parties incapable of contracting at all :—they do not put asunder those who are joined together, but they previously hinder the junction ;—and if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial union ; and, therefore, no sentence of avoidance is necessary.

The present is not a void, but a voidable marriage ; and, therefore, not having been declared void in the lifetime of the parties, is valid to all civil purposes ; and to all such purposes, the deceased died the wife of William Gurr, and he was her husband, and their issue are legitimate ; one of the civil rights of the husband is, that of administration to his wife, which is held to be within the statute of administrations ; and is expressly confirmed by statute 29 *Car.* 2. c. 3., both the administration and the property belong exclusively

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to the husband,—it is not an ecclesiastical, but a civil right,—though it is a right administered in this Court.

In a matter so clear of doubt it is almost waste of time to quote authorities. Modern cases would hardly be found, because such a point has hardly been questioned in modern times. But it is so laid down by Bracton and Holt; and is thus stated by Lord Coke, (a) “*If a marriage de facto be void—able by divorce, in respect of consanguinity, affinity, pre-contract, or such like, whereby the marriage would have been dissolved, and the parties freed ex vinculo matrimonii, yet if the husband die before any divorce, then, for that it cannot now be avoided, the wife de facto shall be endowed; for this is legitimum matrimonium quoad dotem; and so in a writ of dower, the bishop ought to certify that they were legitimo matrimonio copulati, according to the words of the writ;—but if they were divorced à vinculo matrimonii in the lifetime of the husband, then she loseth her dower.*”

Here, then, it is clearly laid down, that unless it is avoided in the lifetime, it is *legitimum matrimonium quoad dotem*.

The distinction of a void marriage may be seen in the case of *Hemming v. Price*. (b)—*Hemming was libelled ex officio, for adultery with a person dead.—She pleaded that they were married, and had issue; it was replied, that she had a former husband then living:—A prohibition was prayed alleging*

(a) Co. Litt. 33, a.

(b) 12 Mod. 432.

that the suit would have the effect of bastardizing the issue.

HOLT, C. J.—*The issue are bastardized without any proceedings, if the parents were never married; the Ecclesiastical Court shall not proceed to dissolve a marriage de facto, after the death of either party, as in the case of consanguinity, pre-contract, and the like;—but in this case, if the replication be true, the marriage was, ipso facto, void.*

Per Cur. No prohibition.

In this case, therefore, the marriage was *ipso facto* void, because there was a former husband living, and therefore it required no sentence.

The case cited, of *Haydon v. Gould*, (c), was a marriage between Sabbatarians, not celebrated by a priest;—this was held to be no marriage,—a void marriage,—a mere nullity. The Court said, *Haydon demanding a right by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself to the administration.*

In that case, the ecclesiastical law held that they were never married; in the case now before me the ecclesiastical law, as established in these realms, notwithstanding the canonical disabilities, (and the bishop is bound so to certify) holds that the parties were *legitimo matrimonio copulati* at the time of the death, the marriage being only voidable, but not having been avoided by sentence of divorce during the lifetime of the parties.

In the present case, then, the parties having been

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de facto married, and that marriage, though voidable, not having been declared void in the lifetime of the parties ;—the husband remained husband to all civil purposes, and is clearly entitled to the administration.

The constant course of practice is in entire conformity with this :—both the husband and the wife uniformly take such administrations—no person can be found to question it, for no case can be produced ; and no similar decree is brought forward. If parties will try experiments, and call in question rules clearly established by an uniform course of practice, they, and not the parties proceeded against ought to be liable to the expenses. It is the duty of the Court to check such novelties in practice, by costs.

Costs given.

1812.
Trinity
Term,
June 20.

BELL v. TIMISWOOD.

The Court
never forces
a joint admin-
istration.

JUDGMENT.

SIR JOHN NICHOLL.

The interest of Robert Timiswood has been admitted as one of the next of kin ;—Joseph Bell prays to be joined in the administration with him ;—Timiswood objects, and prays that it may be decreed solely to himself.

The Court never forces a joint administration,

and for an obvious reason ;—because it is necessary for the administrators to join in every act,—there might be a complete contrariety of action, and it would be in the power of one of them to defeat the whole administration.

1812;
Trinity
Term.
BELL
v.
TIMISWOOD.

The question then is, to which of the two must the Court grant it in this instance? Both are in an equal degree of relationship ;—no objection is stated to Timiswood ;—but against Bell it is said that he has been twice a bankrupt, and that the last time there were no dividends.

Surely, if the Court has an option (as it undoubtedly has) between these two parties, I shall not think Mr. Bell, who has taken such bad care of his own affairs, the preferable person to be entrusted with the management of the affairs of others.—One party is unobjectionable ;—the other is highly objectionable.

I shall grant the administration to Timiswood—and condemn the other party in costs.

RICKARDS v. MUMFORD and FREEMAN.

1812.
June 20,
Trinity
Term.

GEORGE RICKARDS died on the 25th of November, 1810. On the 11th of July of the same year, he executed a will in duplicate, one part of which he retained in his own possession ;—the other he sent by his attorney to Mrs. Freeman. The former instrument was not found at his death ;—

By cancelling a will in his own possession, a testator cancels a duplicate in the custody of another person.

1812.
Trinity
Term.

RICKARDS
v.

MUMFORD.

the duplicate sent to Mrs. Freeman was propounded by her, and Mr. Mumford, the other executor named in it; and opposed by Mrs. Rickards, the widow of the deceased.

Adams and Jenner for the executors.

Swabey and Burnaby contra.

JUDGMENT.

SIR JOHN NICHOLL.

There is no question as to the due execution of this will; but the true question in the cause is whether this will was revoked by the deceased.

Before I proceed to the facts of the case, it may be convenient to state the one or two positions of law, or rather of legal presumption.

Where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is, that he has destroyed it himself,—it cannot be presumed that the destruction has taken place by any other person without his knowledge or authority, for that would be presuming a crime. Again,—if a testator executes a duplicate, and keeps one part himself, and deposits the other part with some other person, and the testator voluntarily cancels, or destroys the part in his own custody, it is a revocation of both. So also,—the act of cancellation, or destruction, is *prima facie* done *animo cancellandi*, and a presumptive intention to revoke, till the contrary is shewn. The reason is, that the act of voluntarily destroying the instrument implies the intention of revoking its whole effect.

These positions have frequently been laid down in this Court as legal presumptions; but, like all

other legal presumptions, they may be repelled by evidence. The *prima facie* presumption, then, is, that the deceased himself destroyed the will in his own custody, with the intention of revoking it altogether.—But, to proceed to the facts of the case :—The will was executed in July, 1810 ;—on the 29th of October, 1810, he married ;—previous to his marriage, but after making his will, he had executed a settlement of certain estates on his wife ;—freehold property at Hatton ; leasehold at Kennington. The Hatton estate is specifically devised by the will to raise 600*l.* which is bequeathed in legacies to his cousin Freeman for life, and then to Mumford's children :—Mr. Mumford himself is also a considerable legatee ;—the whole fortune is divided by various legacies among his family and friends.

Such a will, therefore, could hardly, by possibility, have been intended, under such a change of circumstances, to have remained unaltered and unrevoked. His marriage, though not a revocation of it, yet is a circumstance to account for the destruction of the instrument by the deceased, as it would probably induce some alteration in the disposition of his fortune ; for, notwithstanding the settlement, Woodward admits that the deceased talked of perhaps doing something more for his wife ; and, as the settlement is only in bar of dower, the presumption is, that he intended her to be benefited out of his personal property, and the will became inofficious.

But, supposing the settlement had done every thing he intended to do for his wife ; still, the

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Trinity
Term.

RICKARDS
v.
MUMFORD.

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MUMFORD.

taking these estates out of the operation of his will, would almost necessarily have induced a new arrangement and disposition of his fortune among his family, and friends; and, in conformity with this, the evidence on both sides concurs to prove that it was the intention of the deceased to alter the disposition of his property, and to make a new will;—what that disposition would have been, the Court has no means of knowing; but there is enough to shew that it certainly would have been of a different tenor from the will in question.

Now, having arrived at this fact, we have a strong ground of probability, not to repel, but to support, the legal presumption, that the deceased himself destroyed the instrument in his own possession *animo revocandi*, it no longer containing that disposition which he wished to take effect.

Witnesses have been examined on both sides, to declarations made by the deceased; and also to declarations made by the widow after his death.—The deceased made several wills, which he destroyed; and he seems always to have employed different attorneys. Woodward, an attorney at Pershore, made a will for him three or four years ago:—Sandilands, an attorney at Tewkesbury, made a will for him in June 1810:—Hervey, an attorney at Ross, made the will in question:—White, an attorney at Tewkesbury, drew his marriage settlement in October, 1810:—and Mr. Hyde, an attorney at Worcester, was applied to to make his new will.

Tidmarsh, an intimate friend of the deceased, and a perfectly disinterested witness, says; “that

"when he was talking to the deceased about going for his marriage license, he said he would fetch down his wills, and burn them ; and accordingly he went up stairs and fetched them, and said he would burn them : but the deponent advised him not, saying, he might not marry ;—he might die ;—and he did not know what might happen ; and the deceased replied, that is a good thought ; I will not burn them till afterwards."

1812.
Trinity
Term.
RICKARDS
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MUMFORD.

Here, then, the deceased's intention is to destroy his will ; his mode of revocation was, not by cancelling the instrument, but by burning it ; and he only defers doing it till after his marriage, lest any accident should prevent the marriage.

On the 1st of November, three days after the marriage, Mr. Woodward has a conversation with the deceased ;—he tells him of his marriage ;—he fetches down his wills ;—he burns that prepared by Sandilands in June ;—he has this will of July read over to him ;—he says "it will be a loss to Mumford, if I don't alter it ;—perhaps, in a few days, I may send to you to do it ;—till then, I shall take care of this ; and he carried it up stairs again."—He says, "That on the 21st of November, the deceased again told him, I have not altered my will ; it remains as it was ; but I think I shall send, or come to you in a few days ;—but, he added, in a jocular way, 'You lawyers charge so high ; it is dangerous to have any thing to do with you.'"

It has been inferred from this conversation that the deceased had not at this time destroyed his will ; but if this was so, it does not follow that he might not subsequently destroy it :—it is clear, however,

1812.

*Trinity
Term.*RICKARDS
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MUMFORD.

that he was not sincere in his expression ; for he had that day been making arrangements to go over to Worcester, to get Mr. Hyde to make a will for him.

The declarations on the other side are more direct, and such as, when connected with conduct, leave no doubt, or hesitation on my mind.—Mr. Baker, an intimate friend of the deceased, says, that he applied to him on the 14th of November, to prepare a new will for him ; he said he had one at home which would serve as a guide :—he appointed to be with him on the Sunday following :—on Sunday he advised the deceased, as his property was considerable, to employ a professional man ;—the deceased thanked him, and said he would go in the course of a week to Worcester, to a Mr. Hyde to do it ; and he well remembers that he then said, “I will immediately destroy the will I have “by me, and go to Worcester and make another.”

The only will he had then by him was the will in question ;—for he had destroyed the will prepared by Sandilands on the first of November, when Woodward was with him.

The evidence does not rest here ; for Mr. Tidmarsh says, that “on the Wednesday following, “*i. e.* (on the 21st of November,) the deceased told “him that Baker had recommended him to go to “an attorney, and that he meant to apply to one “at Worcester ;—he promised to accompany the “deceased there on the Thursday in the following “week, or sooner, if he wished it ;” and that the deceased, in the same conversation, said, “Charles, “I have burnt them wills you saw me with the other “day, and the sooner we go to Worcester the bet-

“ter;”—and he pressed the deponent very much to go to Worcester with him on the Friday following.

This is an express declaration that he had burnt the wills; and it is made the basis of his conduct:—it is the reason assigned for hastening the going to Worcester.

Coupling this evidence together, the declaration to Baker on the 18th, “that he would burn it immediately;”—and the declaration to Tidmarsh on the 21st, “that he had burnt it; and, therefore, that the sooner he went to Worcester the better;” we have the strongest confirmation of that, which is the legal presumption, namely, that the deceased himself dissolved the instrument in his own custody, and that he did it *animo cancellandi*.

With respect to the declarations imputed to the wife, and her having said that the will was not destroyed, and also her silence, from whence it is inferred that she knew nothing of the destruction of the will by her husband; they are of little weight in themselves, and the evidence respecting them is at best contradictory.—In her answers she states her full persuasion that her husband had destroyed it;—there is nothing to impeach her character;—it is impossible to infer otherwise, from the expressions attributed to her by the witnesses. Both Baker and Harris say, that Mrs. Rickards declared to them that the deceased had, a few days before his death, produced his will to her, and asked her if she wished to see it before he destroyed it;—and that she supposed he had burnt it.

Neither her silence, therefore, under the circumstances in which she was placed, nor any thing

1812.
Trinity
Term.

RICKARDS
v.
MUMFORD.

1812.
Trinity
Term.

RICKARDS
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MUMFORDS.

she had said, raises any just suspicion that she was guilty of having destroyed the will.

The conclusion of the Court on the whole of the evidence is, that the deceased himself destroyed the will in his possession;—that he did this intentionally;—and that he not only thereby cancelled the paper itself, but the duplicate which was not in his possession.

I pronounce against the will, and decree administration to the widow.

Trinity
Term.
June 20.

Unfinished
paper not es-
tablished as
codicillary.

CARSTAIRS the Attorney of GRIFFITHS, v. POTTLE.

WILLIAM WHEELER sailed from Madras for England on the 16th of March, 1811:—he died on the voyage on the 19th of May, of an abscess, which had formed on his side three weeks before his death;—a week before his death he was sensible that he could not live.—On the day before he left Madras, he made a will of the following tenor:—

“In the name of God Amen, I William
“Wheeler, of Portsmouth, in the county of
“Southampton, and now of Madras, being
“about embarking on board the H. C. S.
“Anne, for Europe; and being in sound mind
“and memory, make this my last will and tes-
“tament. 1st, I resign to the Almighty my
“sole, to be disposed of as it may please him,

"trusting it will be recevd into the kingdom,
 "there to enjoy everlasting happiness, and
 "my body to the earth from whence it came.
 "2d, I give and bequeath unto each of my
 "uncel Lewises children, who now live at
 "Waterford, near Portsmouth, the sum of
 "one hundred pounds sterling. 3d, I give
 "and bequeath unto my cousin Nothem Ben-
 "netts son, Henry Bennet, the sum of five
 "hundred pounds sterling. 4th, I give and
 "bequeath unto my uncel Exeus children,
 "and my uncel Morgans children, to be
 "equally divided among them, all the re-
 "mainder of my property, of whatever kind
 "it may be: and I hereby wish R. Griffiths
 "to be my attorney, to see that my poor re-
 "lations recive all that is due to them from
 "this will: in fact, I appoint the Mr. Griffiths
 "to act in all matters that concern me. This
 "is my last will and testament, written by
 "myself, the 15th fifteenth day of Marh, in
 "the year of our Lord 1811, one thousand
 "eight hundred and eleven. Amen.

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"W. WHEELER.

Madras, 15th Marsh, 1811.

"Witness,

"*J. Baggett,*

"*S. James.*"

This will was proved in the supreme Court of
 judicature at Madras.

The three following papers, of a testamentary
 nature, were found in the writing desk of the
 deceased, on board the vessel, after his death, viz.

1812. <i>Trinity</i> <i>Term.</i>	(A.)	
CARSTAIRS v. POTTE.	Each of my uncel Lewis } children }	£100
	Nathers son	500
	Morgan and Exell to get the remainder	

(B.) (a)	
To Mrs. George or her daughters	500
To Mrs. Morgan	500
To Mrs. H. the aboves sister	5
Mr. W. Sabbin	300
To Mr. Joseph Read	100
To Miss Morratt, Madras	100
	6,000
	4,000
	1,000
	1,000
	600
	£12,600

(C.)

“In the name of God, Amen, I William
 “Wheeler, of Portsmouth, in the county of
 “Southampton, and now residing in Madras,
 “and at present am a partner in the firm of
 “Griffith, Wheeler, Griffith, and Cook, and
 “being in sound mind and memory, do make
 “this my last will and testament.

(a) In paper (B.) there were several other names, with sums opposite to them, but both the names and the sums struck out with a pen.

1. "I resign to the Almighty my sole to be
 "disposed of as it may please him, trusting it
 "will be received into the kingdom of heaven,
 "there to enjoy everlasting happiness; and
 "body to the earth from whence it came.

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"2. I give and bequeath unto my cousin
 "Morgan, who is married to Mr. Pottle, and I
 "believe are now living at Fareham, about
 "ten miles from Portsmouth, the sum of
 "6,000*l.*, to be equally divided among her
 "brothers and sisters and herself.

"3. I give and bequeath to my cousin Isa-
 "bella Breaden, eldest daughter to my uncel
 "Exell, and her brothers and sisters, to be
 "divided equally between them, the sum of
 "4,000*l.*

"4. I give and bequeath unto master Henry
 "Bennett, who is a son of my late cousin Na-
 "then Bennett, and who will be found on en-
 "quiry at Mr. Morris, Piercy-street, Ports-
 "mouth, the sum of 1,000*l.*

"5. I give and bequeath to my cousin Leah
 "and Charlotte Lewes, eldest daughters of my
 "uncel Lewes, who lives at Waterford, the sum
 "of 600*l.* or provid'd either of them are dead,
 "her share to be divided among her sisters."

The three testamentary papers, marked A., B.,
 and C., were found in the writing-desk of the de-
 ceased on board the vessel, after his death.

Mrs. Pottle propounded paper C. as codicillary
 to the will of the 15th of March, 1811.

The allegation in which it was propounded
 pleaded, "that about a week after the deceased

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POTTER.

was confined to his cabin, an abscess broke in his side, and from that time he was sensible of his approaching death, and declared he thought it impossible for him to recover; that, whilst on shipboard he was reserved upon the subject of himself and his affairs, and that he was attended only by a man-servant: that he used, prior to his being confined to his cabin, to employ himself much in writing at his writing-desk, corresponding at times with friends of his, who were passengers on board other vessels of the fleet, and he was frequently observed to destroy the papers he had written. That after becoming confined to his cabin, he again wrote at different times, and was particularly remarked to be employed in writing the aforesaid papers, A., B., and C., or some papers very nearly resembling the same in size and appearance; and from the time of his being so confined to his cabin, he was not observed to destroy any papers. That on the second, or the third day, immediately preceding his death, being then wholly confined to his cot, he requested his servant to bring him his writing desk, as he wished to write, and it was accordingly placed upon a pillow across his knees, and he was raised up, and supported by pillows at his back, after which he was left alone for about an hour; when his servant returning to the cabin, found that he had folded up together several papers, upon some or one of which he had been writing; and he, the said deceased, then apparently much exhausted, desired his servant to lock up the same in the writing desk, the key of which the deceased kept fastened to his watch-chain, and the same was accordingly

done, and from that time till his death the said deceased grew gradually weaker and weaker, and never again attempted to write, nor was he, from weakness, at any time able so to have done. And in the evening of the following day the aforesaid writing-desk fell down from the stand on which it had been placed, and the hinge was broken, and there fell out some pagodas in specie, and the aforesaid papers; which the deceased having observed, earnestly desired them to be replaced carefully, telling his servant not to mind the money, as that was of no consequence in comparison with the papers; and the papers, which were found to consist of two small papers, folded, or wrapped up in a large one, having been, together with the specie replaced, the desk was not again opened till after the death of the said deceased."

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Swabey and Burnaby opposed the admission of the allegation.

Phillimore and Herbert supported it.

JUDGMENT

Sir JOHN NICHOLL.

I agree with the counsel for Mrs. Pottle, that if this paper should not be inconsistent with the will, it might be proved in conjunction with it. The rule is, that where there is a regular will, and another paper begun as a new will, which the testator has been prevented by the act of God from completing, the two papers may be taken together as the will of the deceased, and operation *pro tanto* be given to the latter paper, provided the proof of final intention be clear: but it will not wholly revoke the former paper.

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The present case, however, does not fall within this rule of law.

The deceased embarked from Madras for England, on the 16th of May, and on the day before executed a will, leaving legacies to different relations, and two bequests to his uncle's children:—that will has been proved in India;—shortly afterwards, as he was proceeding in his voyage, he is stated to have entertained an intention to make some alterations in the distribution of his property among his own family.

Three papers are before the court.

A. is a short abstract of the executed will.

B. is a calculation of his property without date.

C. is the paper propounded. There are no executors named in it;—it contains no disposition of the residue;—it has no date,—no conclusion;—it is clearly unfinished;—upon the face of it there is no *constat* when it was written;—it might have been before the executed will;—it might, and it really appears to me that it was, written before;—it begins in regular form, and describes him “*as now resident at Madras.*” Compare this with the inception of the will written before he left Madras;—in that he states himself to be “about to embark.” Paper *C.* could not be copied from the executed will, for he had it not with him.

It has been urged that, from the extension of the legacy to his cousin Bennett's son, it must have been written subsequently to the executed will;—it might have been the reverse, he might have ascertained his property to be smaller than he expected. In the allegation nothing direct is pleaded as to the date.

As it is unfinished, and the object of it is to controul a will regularly executed a short time before, I must be satisfied that he was prevented by the act of God, from the due execution of it:—independently of this, there is nothing to shew that he had made up his mind to this alteration as far as it goes;—the deceased for three weeks was sensible of the dangerous state of his health:—this paper was broken off in the middle, and there is not a single declaration that he ever meant to conclude it; he expresses no wish on the subject, there is no reference by him to any testamentary act.

Upon the whole, the Court would not be safe in pronouncing for this paper:—if all the facts alleged should be proved, they would be insufficient to establish an instrument in this very incomplete and uncertain state, so as to controul a will regularly executed a short time previously.

I shall reject this allegation; at the same time it is very proper that it should have been submitted to the consideration of the Court, and I recommend the executors to pay the costs of the proceeding.

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BUTLER v. BUTLER.

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June 20.

JUDGMENT.

SIR JOHN NICHOLL.

Edward Butler is the party deceased:—administration of his effects was granted to his widow:—an inventory was called for by four of his next of kin, two brothers and two sisters, which was

Objection to
an inventory
over-ruled.

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exhibited in November, 1811; and the party prayed to be dismissed. She was assigned to be so, if not objected to, on the Bye Day; no objection was taken; and, on the Caveat day, she was actually dismissed.

On the first session of Hilary Term, the Proctor for the brothers and sisters alleged that he had been mistaken on the caveat day; and prayed still to be allowed to object; this indulgence was granted;—an allegation was asserted, and then waived;—an act on petition was gone into it;—if he did not make good his objections, there was some peril of costs, for he has kept the other party three terms before the Court, and put him to considerable expense.

The objection to the inventory is in three items, which are said to have been omitted;—this is a serious charge; fraud and perjury are almost necessarily imputed by it to the widow;—fraud by concealment and omission;—perjury, in swearing that all the articles of the deceased's property were set forth in the inventory;—this charge has been answered by affidavit, and is now abandoned; it is admitted that the deceased had no such property; and that there is no omission in the inventory. If the parties had inquired, they might have satisfied themselves that there was no ground of suspicion whatever;—none for charging the widow with omission;—the utmost length the Court would have gone, would have been to hold that, from the declarations of the deceased, there was reasonable ground of inquiry:—a little diligent inquiry and candid examination would have cleared up this point.

When this point was satisfactorily answered, (and it was the only question at issue) a new objection was taken; not to the inventory, but to the administration. It is said, that the administration is taken out under the proper sum; and that the securities ought to be called upon to justify. The amount of the property is stated in the inventory at 3550*l.*, and the administration has been taken out under 3500*l.* The widow answers that the whole amount of the property, in value, is 3550*l.*; but that some of the debts due to the deceased have not been received, and probably never will be recovered; and if they should, she shall then take a new administration. The Revenue requires the administration to be taken to the extent of the sum received,—that is sufficiently hard,—but the administrator is bound to take out the grant to the extent of the sum he expects to receive;—this is as much as the widow can in this case expect to receive.

This appears to me a mere frivolous objection; why was it not taken as soon as the inventory was exhibited? The turning round in this way, so far from protecting the party from costs, is a strong additional ground for them;—and it is lenient in the Court not to condemn in the whole costs;—but I shall condemn in those costs which have arisen subsequent to the second session of last Easter Term.

With respect to the securities justifying;—it is no part of the present petition;—the petition relates only to the inventory, and the omission in the inventory.

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June 25.

ARCHES COURT OF CANTERBURY.

COOKE v. COOKE.

*(An Appeal from the Commissary Court of the
Dean and Chapter of St. Paul's.)*

A moiety of the husband's property given to the wife for permanent alimony—but given from the date of the sentence, and not from the return of the citation.

JUDGMENT.

SIR JOHN NICHOLL.

This was originally a suit by reason of adultery, brought by Hannah Fox Cooke, against Richard Cooke, her husband :—the wife succeeded in that suit ;—the judge pronounced the libel (*a*) proved—and decreed a separation :—that sentence has been acquiesced in ;—the delinquency, therefore, of the husband has been established, and is admitted. The Court below then proceeded to allot a permanent alimony to the wife ;—no alimony during the suit had been applied for ;—but, as the wife had a separate income, it was understood that an application for any further allowance, during the suit, as alimony, would be resisted ; and she remained content with her separate allowance. I consider this as tantamount to alimony during suit.

The question afterwards (*b*) came on as to the allotment of permanent alimony ;—and the husband

(*a*) Michaelmas Term, Nov. 9, 1811.

(*b*) March 6, 1812.

has appealed to this Court, complaining that too large a sum has been allotted to the wife: and the question which the Court has now to decide, is, whether the sum allotted be too large or not.

Now, although alimony, that is, the allowance to be made to a wife for her maintenance, either during a matrimonial suit, or when she has proved herself entitled to a separate maintenance,—is said to be discretionary with the Court; but it is a judicial, not an arbitrary discretion, which is to be exercised; and therefore, it is clearly a subject of appeal:—at the same time, upon a point where there is no other rule or criterion to guide than the *boni viri arbitrium*, it is only upon a strong difference of opinion where the Court of appeal would be disposed to disturb the sentence.

The first point to be ascertained, is the meaning and extent of the sentence;—the words are, “*The Judge allotted the sum of 450*l.* per annum, in addition to the income which she (the wife) now receives in her own right, to be paid her as per-manent alimony, to be computed from the return of the citation, and to be paid quarterly.*”

It does not appear upon the face of the sentence, what it is that the wife receives “*in her own right* ;”—there is no statement of the sum, nor is there any reference in the sentence itself to any income, or to any part of the proceedings in which that income is mentioned.

In the first article of the allegation of faculties, certain property is referred to of that description, and it amounts to about 89*l.* a year, besides a house worth about 80*l.* annually:—the answers to this.

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article admit these statements; but in the answers to the 8th article it is stated, that besides this property, which was settled on the wife before marriage, there was a further settlement in 1815, subsequent to the marriage, of 162*l.* annually. An affidavit has been also made by the wife, in which she states the joint amount.

It is not quite clear whether the 450*l.* was in addition to both of the settlements, or only to one. I have enquired whether any thing passed in the Court below, or was understood there by the parties, which would afford a construction of the sentence in this respect; and no answer has been given: I must, therefore, seek the construction from the expressions;—the words are “*in addition to the income which she now receives in her own right;*”—these words are only applied to the property mentioned in the first article, and in her answers to that article:—there it is expressly so described; but no such expression is cited either in the answers to the 8th article, or in her affidavit, as applied to the second settlement, *viz.* the one made after marriage. The 450*l.* therefore, must be construed as additional to the sum secured by settlement before marriage, and not to include the subsequent settlement.

This property consists of three tenements, which together are let for 99*l. per annum*, and a house in which the parties resided, worth now about 80*l. per annum*:—the husband has retained possession of this house during the suit:—but he has now declared in acts of Court, that he is ready to deliver it up with the improvements, to his wife;

taking then the house, in its improved state, at 80*l.*, the other tenements at 99*l.*, and the 450*l.*, (the whole alimony allotted) taken together, would amount to nearly 630*l.*, subject however to the property tax.

The question is, whether this be too large a proportion out of the joint fund?

It is unnecessary to ascertain to a few pounds, the exact amount of the property; but it is to be observed that in the particulars of the property in possession of the husband, amounting to 800*l. per annum*, he has deducted the property-tax and all other outgoings, and besides this he has the advantage of having the amount taken upon the representation given by himself, in his own answers;—so that the sum allotted to the wife is rather less than a moiety of the joint stock;—of this not less than 800*l. per annum* has been derived from the wife.

It has been truly stated that there is a material distinction between permanent alimony, and alimony during suit:—it is unnecessary to enter into the reasons for this;—they are obvious;—it is sufficient that such is the rule of the Court.

In *Biggs v. Biggs*, (c) the alimony during suit was 40*l.*;—the permanent alimony was 75*l.*

In the Countess of Pomfret *v.* The Earl of Pomfret, though there was a large fortune, and the husband had to maintain the rank and dignity of the peerage, one third was given, *i. e.* 4000*l.* out of 12,000*l.* Certainly, the wife had brought a

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(c) Consist. of London, May 28, 1791.

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large fortune, but then she was elevated in rank by the marriage.

In *Taylor v. Taylor* (d) the income was about 300*l.*, and a moiety was given: it was certainly proved in that case, that a large proportion of the fortune came from the wife; but it furnishes a precedent for a moiety:—it is said that in that case the income was smaller, and that the Court always gives a larger proportion where the income is small;—there may be good reasons for giving less where the question is on alimony during suit; when the wife is to live in seclusion, and wants a mere subsistence;—but on a question of permanent alimony, where the delinquency of the husband is established, and especially where a large proportion of the fortune comes from the wife, the same considerations do not apply:—nay, they may be inverted;—it is the delinquent, then, who should have the mere subsistence, and who ought to live in retirement;—the larger the fortune is, the less reason there is why the wife should be deprived of any of her property to support a vicious and profligate husband;—but, without going the length of this reasoning, the case of *Taylor* affords a precedent for a moiety.—In some cases, even of small property, certainly a less proportion has been given; but in those cases the husband has acquired his subsistence by his own personal exertions.

In *Biggs v. Biggs*, 75*l.* was given; the husband was a seller of venison, and his income stated to be 300*l.*

(d) *Archæ*, May 14, 1796.

In *Dawson v. Dawson* (e) 80*l.* was given; the husband was a working jeweller, and his income stated to be 300*l.*

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In the present case, the bulk of the fortune comes from the wife; and the husband, so far from increasing the property by his own exertion, has neglected and given up his business, and is living in a state of open adultery.

I quite concur in all that has been said, as to its being a part of the duty of every Court of Justice to guard the public morals of society,—this principle has been fully established, and forcibly applied to cases where the husband is the injured party:—on this principle pecuniary damages are awarded in other Courts;—and where the husband is the delinquent, and the wife the injured party, the same principle may be justly applied, not vindictively, nor excessively, but reasonably and moderately.

In this instance the husband raised himself to independence and affluence by marrying this young woman; he has not only injured, but insulted her, by debauching a maid-servant who lived at the adjoining house;—for this servant he has taken a house, and for her society he has abandoned the society of his wife;—he has children by her, and receives his friends in the house, and introduces her to them as his wife.

It is a most offensive case;—if he violates the marriage contract, it might be equitable, perhaps, that he should lose the whole benefit of it, and be obliged to give up the whole of the wife's property; at all events, it would be most unjust that the wife

(e) Consist. of London, July 23, 1802.

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should be deprived of any considerable portion of the property she brought, in order to support the husband in public scandal, and to enable him to continue his adulterous connexion, and provide for the issue which are the fruits of it.

Construing the sentence therefore, as I have done, I do not think that the learned Judge went too far in the additional sum which he allotted. I am, therefore, in no degree disposed to disturb that part of the sentence, except so far as to add some words to it in order to render the meaning more clear and certain.

In respect to the time from which the alimony is payable, namely, from the return of the citation, this, I apprehend, is contrary to the rule of the Court, and to the reason of the thing. No alimony was expressly allotted during the suit; but, on the one hand, as what she was willing to receive as a sort of separate allowance, while she was living under his roof, without the payment of either rent or taxes, (in the hope, probably, of reclaiming her husband) is no criterion for permanent alimony; so, on the other hand, I can see no ground to depart from the ordinary rule of these Courts, by carrying back the permanent alimony beyond the date of the sentence.

It is clear from several cases that the true rule of the Court is to decree permanent alimony from the date of the sentence.

In *Taylor v. Taylor*, no time was specified; the sentence and the decree for alimony passed on the same day; and, therefore, the alimony must have been from the date of it.

In *Biggs v. Biggs* the rule is more manifest;—the alimony during the suit was 40*l.*; it was increased to 75*l.* from the date of the sentence.

This case is directly in point, and under the authority of it I feel bound to reverse this part of the sentence.

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Accordingly the Court pronounced for the appeal and complaint made and interposed in this behalf, and retained the principal cause, and therein affirmed so much of the decree appealed from as allotted the sum of 450*l. per annum*, as alimony, to Hannah Fox Cooke, the respondent, in addition to the income described to be received by her in her own right, so far as such income arises from the property mentioned in the first article of the allegation of faculties admitted in this cause, including the leasehold house situate in the terrace, Kentish Town, with its improvements, and in its present condition, agreed to be delivered up to her by a declaration made by Richard Cooke, the appellant, in acts of Court, on the third session of this term, but directed that any sum received by the said Hannah Fox Cooke, since the sentence given in the Court below, or which may hereafter be received by her under a certain settlement alleged to have been made subsequent to her marriage with the said Richard Cooke, and to amount to 162*l. per annum*, shall be considered as a part of the 450*l.* so allotted, and not as part of the income received by the said Hannah Fox Cooke in her own right, and moreover reversed so much of the said decree appealed

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from as directed the said sum of 450*l. per annum* to be computed from the return of the citation issued in the Court below, and directed the same to be computed from the day of the sentence in the said Court; and further directed the costs to be paid by the appellant, and directed a monition to issue against Mr. Cooke for the payment of the alimony due.

June 27.

HARLEY v. BAGSHAW.

Three papers
established as
containing to-
gether a will.

JUDGMENT.

SIR JOHN NICHOLL.

Several papers are propounded, as the will of Mrs. Anne Newton;—they are propounded by Miss Harley, a legatee, and opposed by Mr. Bagshaw, the brother of the deceased.

Besides the papers propounded, there are two testamentary instruments of a much earlier date.—The deceased was a widow, possessed of very considerable property, who resided in Harley-street: all the papers are in her own handwriting.

No. 1. is the inception of a will, in which no great progress had been made, the deceased having only written down the side.

No. 2. is a long will consisting of two sheets of paper, fully written, signed by the deceased in several parts; the last date is Jan. 16, 1808;—the first date is June 1, 1804: there is another of Nov. 1804; and others of the 5th of Feb. and 6th of Jan. 1806. It appears to have been the habit of

the deceased to write her will at different times ;—adding to it from time to time, and whenever she ceased writing to subscribe the date ; and this she did, even though she wrote at different times in the same day.—The presumption is, that it was so dated, and so signed, to give it effect as far as she had proceeded ;—and possibly she had been told that any paper in her own hand-writing, and signed, would be a valid disposition of her personal property.

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No. 3 is a new will also, in two sheets of paper, fairly written, but in the same manner as in *No. 2* ;—the first date is 12th March, 1806 ; at the end of the third page this is signed ;—there are likewise other entries in 1806, which are also signed. In the second page of the third sheet there is a recital that two of the executors are dead, and that the third is in South America ; and there is the appointment of Miss Harley, daughter of the bishop of Hereford, as sole executrix ; this is dated May 1811, and signed :—after this she proceeds to make additional bequests ;—she stops, dates, and signs at several different places ;—the final signature is in 1811.

No. 4 is a very short instrument, commencing in 1806 ; it is revocatory of a particular legacy ;—it is finally dated in 1811 ;—it clearly refers to *No. 3*, and was altered at the same time.

No. 5 begins as a new will, and was manifestly so intended when originally commenced ;—after introductory words, it appoints Miss Harley sole executrix, and is dated 5th June, 1811 ; it afterwards goes on to give legacies to the same persons

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as in *No. 3*; there are two or three stops, and signatures, but they are all of the same date, viz. 5th June, 1811.

Looking at all these papers together, it is highly probable that the deceased in *No. 5* had not gone so far as she had intended; she had many other objects of bounty, and there is no disposition of the residue: comparing it with former papers, and with the habits of the deceased, it looks as if she had broken off in the middle of what she intended to be a new will, but which was not to revoke and supersede others, unless finished.

It has been contended, that the instrument being dated, and signed at the end, the Court cannot go into the consideration of parole evidence as to intention; if it was a new will completed, parole evidence could not be gone into as to the construction; but in this case *quo animo* it was written; whether it was signed in order to finish it, or whether it was incomplete and imperfect, is a preliminary question, which this court is bound to entertain;—it must enquire into the fact of the intention with which it was written: that intention may be collected from other papers and parole evidence.

In the case of *Matthews v. Warner*, (a) it was held, that in the Court of Probate all circumstances were to be taken together to ascertain whether it was a temporary, or permanent act; the paper in that case was signed, but it was uncertain whether it was perfect or incomplete.

(a) *Matthews v. Warner*, 4 Ves. Jun. 186.

This paper was written by the deceased herself, a female unacquainted with business ; if it is satisfactorily shewn that it was intended at first as an entire new will, yet afterwards as codicillary, there is no rule of law to exclude evidence of intention ; it is the very province of the Court of Probate to enquire into it.

Suppose she had signed this paper in the presence of witnesses, declaring that she was unable to go on, and that she signed it as giving effect to alterations *pro tanto*, and to be taken as a codicil ; surely, on inquiring in this Court, as to the *factum*, we must receive evidence of that intention.

This paper (*No. 5.*) contains no revocatory clause ;—no disposition of the residue ;—if it is a complete and finished paper, it does not require a clause of revocation ;—but if it is unfinished, it will not totally revoke. In such a case, though originally intended as a new will, yet if it is not finished it can only operate in conjunction with the other paper ; it supersedes the other *pro tanto* ;—and both must be considered as containing together the will.

In *Goldwyn and Aspenwall v. Coppell*, there was a will regularly executed in Jamaica. The deceased gave instructions for an entire new will ;—before he had disposed of the residue he became incapable ;—the Court pronounced for the two papers, as containing together the will.

This has been the constant doctrine of the Court ; where instructions are finished they are not revoked by an unfinished paper, except as far as it goes ;—

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the law presumes that the testator would have adhered to the remainder.

In this case the Court is not left to presumption ; the proof of intention is satisfactory, if the evidence is admissible, and if the witnesses are to be believed :—the witnesses, it is true, are releasing witnesses, but they are competent witnesses ; the Court must hear them with caution ; but their evidence is so confirmed that, unless they have corruptly deposed, no doubt exists of the deceased's intention.

The deceased being in very ill health, removed in May from Harley-street, to lodgings in the Edge-ware road :—on the 5th of June she told her maid “that she was going to copy her will, which she “had altered in Harley-street in May.” Mr. Griffiths, the apothecary, confirms this ;—he states, “that he found the deceased, one day in June, “with papers before her, which she put into a “box, saying, the will was in the box, and she “was writing it over again.”—This box, with the papers in it, was delivered to Miss Harley in her lifetime ;—the deceased, then, did not intend to revoke the former will, but to copy it ; and though she might, in so doing, make alterations in form and substance, yet the effect will not be to revoke, but merely to alter as far as it has gone.

The deceased became worse, and did not go on to write after the 5th of June ; but she repeatedly and anxiously declared to her maid, and the woman who attended her, that the will she had altered in Harley-street was to stand good, if she did not

complete the other, and that the other was to be codicillary.

There is a particular conversation deposed to, as having taken place on the 14th of June:—the deceased having become very weak, declares to three persons, earnestly desiring them to entreat her brother to carry her intentions into effect, “*I mean, she said, my will I altered in Harley-street, in May last, and my last, I mean my two last wills to stand good;*” two witnesses depose to this. Mr. Bagshaw, in his answers, admits the same in effect,—that the deceased requested he would not oppose her will; his admission strongly confirms the representation of the witnesses, that there was a solemn declaration, a sort of formal publication of these papers, as containing together her will.

On the 18th of June, also, the day before her death, she recognized the paper No. 3, by referring to a legacy left in it to Sir Walter Farquhar.

Edwardes, the deceased’s maid, says, that “she verily believes the deceased intended the papers “3, and 5, down to the time of her death, should “operate as her will;” and Worthing says, that “the deceased often expressed in the strongest “terms that the will she altered in Harley-street, “and her last, were to stand good, and not to be “disputed.”

This evidence taken, with her declaration to the apothecary, “that her will was in the box, “and that she was writing it over again;” with the admissions of Mr. Bagshaw, in his answers,

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satisfy me that the deceased did not intend to remove No. 3, but wished the instruments taken together to be considered as her will.

I pronounce, therefore, for Nos. 3, 4, and 5, as containing together the will of the deceased.

Trinity
Term.
July 1.

DAMPIER and DAMPIER v. COLSON.

JUDGMENT.

SIR JOHN NICHOLL.

The application of a married sister to be joined in an administration with her two brothers, over-ruled.

The deceased died leaving a widow, two sons, and a daughter ;—he made a will, appointing his wife executrix, and residuary legatee for life ; and gave her the power of disposing of the residue among her children ; but, if she made no disposition, then it was to go between them in thirds.—The widow is in a state of mental imbecility, so that she can neither take probate, nor at present make any disposition of the residue.

The parties before the Court are, the two sons and the daughter, the substituted residuary legatees.—The sons, Edward Dampier, and the Rev. John Dampier, pray the administration jointly to them.—The daughter, Mrs. Colson, who is a married woman, prays to be joined in the administration ; to this the brothers object : Mrs. Colson then prays that a joint nominee may be fixed upon.

Now, *first*, the two sons, who are willing to take it together, have a majority of interests.

In the *next* place, it is not the practice of the Court to force a joint administration upon unwilling parties; and, therefore, it would not compel the brothers to admit Mrs. Colson to be joined with them.

In the *third* place, it is not the practice of the Court to grant from the residuary legatees, to a nominee, where the parties cannot agree.

It is stated that the sons are indebted to the estate, but I do not see the strength of that objection;—they must produce an inventory;—they must charge their debt as part of the property:—the other party will have as full means of investigating whether it is paid in part or not, as if she were to be joined with them, perhaps better. The administrators must give security;—I do not see what risk there is to the estate, or what disadvantage it is placed under.

But there is another ground which alone would guide the discretion of the Court, if there was nothing else to guide it; the deceased has made the two sons trustees for the daughter's share, for herself for life, and then for her children;—there is also some of the property given by will in the same manner to the two sons, in trust for Mrs. Colson; by appointing the sons administrators, they will have an opportunity of executing this trust; but if Mrs. Colson is joined with them, she will have the property at least jointly, and she and her husband may dissipate it, and the trust may be defeated:—it is clearly not the intention of the

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Term.

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deceased that Mrs. Colson or her husband should have the possession even of this third, or the management of his property; the two sons are the testator's own trustees; they are his nominees.

I reject Mrs. Colson's petition, and decree administration with the will annexed, to Edward and John Dampier.

In respect to costs, I really see no ground on which Mrs. Colson contended for the administration;—I think this is rather a case which calls for costs, as the opposition is frivolous and unfounded.

Costs given.

Michaelmas
Term,
Nov. 5.

REEVES *v.* FREELING.

The Court exercises a discretion as to the sort of inventory it requires from an administrator.

PROBATE of the will of John Reeves, had been granted to the executors, but was called in by a son of the deceased, who had been advanced in his father's lifetime, and was no further benefited under the will than as a contingent legatee; the will was proved in solemn form of law, and probate decreed to the executors.

Lushington, for the executors, prayed costs.

Per Curiam.

The son had a right to put the executors on proof of the will; I shall certainly not give costs.

Swabey for the son, prayed an inventory, and

stated that the contingent interest of his party was sufficient to entitle him to it.

Lushington contra, denied the right of the adverse party to an inventory: and said, that in this case it would be attended with great difficulty, as the deceased was engaged in a banking-house, and his profits would not be concluded till May, 1813.

Judgment.

SIR JOHN NICHOLL.

I have known the Court exercise a judgment on these questions, particularly in complicated cases.

It cannot be necessary for the party to enter into all the accounts of the banking-house; the Court will, in this instance, exercise a discretion as to the sort of inventory it will accept:—it cannot be difficult to make one out; there must be an account for the rest of the family; and though the person calling for the inventory has but a contingent interest, he has a right to a *constat* of the effects.

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BROUNCKER and COOKE v. BROUNCKER.

Nov. 12.

LEWIS William Brouncker, Esq. of Barford Hall, in the county of Wilts, died on the 29th of Jan., 1812.—On the 21st of same month, he had executed a formal will of considerable length, drawn up by Mr. Cooke, his solicitor, containing a complete disposition of his property;—this will

Probate refused to a codicil signed and executed.

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was propounded by the executors, and was not opposed; but a codicil, dated three days only subsequent to this instrument, was propounded also on the behalf of the younger children of the testator. The deceased left a widow and nine children; his personal property amounted to about 70,000*l*.

The codicil was as follows:—

Barford House,

Jan. 24th. 1812.

“I am desired by L. W. Brouncker, to request
 “that his executors will make the fortunes of his
 “eight younger children to consist of ten thousand
 “pounds stock, instead of five thousand, which he
 “had given them by a will made by George Cooke,
 “Esq. and executed in the presence of the Rev.
 “George Chandler, of Dalkeith House, (Scotland,
 “Duke of Buccleugh’s) John Hooper, surgeon, of
 “the village of Downton, and Margaret Hawes,
 “governess to L. W. Brouncker’s children, on
 “the 21st of January, one thousand eight hun-
 “dred and twelve. The same to arise from the
 “stock stated for the five thousand stock men-
 “tioned in the said will. The abovementioned
 “will to continue in effect to all the other purposes
 “therein contained.

“MARY STRODE.

“If the alteration for which these directions have
 “been given has been already made, namely, five
 “additional thousand pounds stock, this paper is
 “not to be of any effect.

“MARY STRODE.

"Further added by L. W. Brouncker's desire ;
 "this memorandum I consider as a codicil to my
 "will.

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"L. W. BROUNCKER.

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"Witness, *Richard Fowler, M. D.*

Mary Strode."

Jenner and Phillimore in support of the codicil.
Swabey and Lushington, contra.

JUDGMENT.

SIR JOHN NICHOLL.

The deceased, Lewis William Brouncker, died on Wednesday, the 29th of January, 1812. The codicil propounded is dated on the 24th of January, 1812. The deceased is stated to have been possessed of a very considerable fortune, about 70,000*l.* sterling, in money, and a landed estate worth about 4000*l.*, the whole producing about 3,500*l. per annum.* This estate is charged with two annuities, amounting to 160*l. per annum* ; a settlement on his wife of 500*l. per annum* ; and 2000*l.* generally on his younger children.

On the 21st of January, three days only before the date of the codicil, the deceased executed a complete and long will, in full form,—containing a just and proper disposition of his property ;—it is of considerable length, and must have taken considerable time in making ; even the draft which is before the Court has the appearance of having been prepared a considerable time. He had an eldest son, and eight younger children ;—by this will he gives an additional annuity to his wife of 500*l.*, making her provision 1000*l. per annum*,

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besides a legacy of 1000*l.*, and all his plate, linen, furniture, &c.; and he bequeaths 5000*l.* 3 *per cent.* to each of his younger children.

By the codicil now propounded, the fortune of the younger children is doubled; 5000*l.* 3 *per cents.* additional is given to them;—so that there are 80,000*l.* 3 *per cents.*, nearly 50,000*l.* sterling, given to the younger children, which will not leave a sufficiency to cover the annuity to the widow, and the other charges on the estate;—and must leave the eldest son destitute.

It is pleaded that the deceased had a strong affection for his eldest son;—there is no particular proof of this;—but it is clearly proved that he had no disaffection towards him;—his affection is evinced by the will of the 21st of January;—and this, from the provisions it contains, is decisive of a firm intention to make an eldest son;—it shews it to have been his deliberate and firm intention.

The question then is, whether the deceased was in possession of a sound and disposing memory at the time of making this codicil, sufficiently so, to effect the almost entire subversion of his solemn will, executed only four days before, and to leave his eldest son for the present destitute, or at best dependent on his mother during her life.

The presumption of law is strongly in favour of the executed will:—the Court must consider whether the capacity was adequate to the subsequent act:—the proof of the capacity must depend upon the nature of the act; and all circumstances must be taken together, to ascertain the real testamentary intentions.

The testator was very ill at his residence at Barford House, about nine miles from Salisbury ;—his sister, Mrs. Strode, came from London to see him on the 23rd of January ;—he appears to have had great confidence in her ;—he mentioned to her his having made his will ;—he seemed perfectly satisfied with the provision made for his children ;—he only doubted whether there was a sufficiency for his wife.

The next morning he sends for his sister,—is extremely eager for her arrival, (she had returned to Salisbury to sleep) asks repeatedly whether she was come,—a further conversation took place with her,—and he again said he had made a handsome provision for his children, and only doubts about his wife ;—this shews that his mind was dwelling on the subject ;—but there is no appearance of any change in respect to the distribution among his children ;—still less, that any thing had arisen in his mind adverse to his eldest son.

The deceased then said, that he must exert his little remaining strength to transact some business respecting his brother, and for that purpose wrote a draft for a person under whose care he was ;—that business being done, his sister left him, “ concluding that all the deceased’s worldly affairs were accomplished,”—she went down stairs to write some letters ;—so that up to that moment there was not the least trace of the deceased being dissatisfied with the provision for his younger children.

It is material to see what was his condition and state during this previous transaction ;—this is fully detailed in the evidence of Mrs. Strode, and a

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greater state of debility can hardly be imagined ;—and the natural effect of his exertion was, that he should remain in an exhausted state ;—and his mind of course more liable to wander. It is also proved, that before this time the deceased had occasional wanderings and deliriums ;—he had the bed-clothes and bolster put at the bottom of the bed, and slept several hours in that mode. The apothecary says, he gave odd and eccentric directions ;—and the servants who attended him speak to several instances of his mind wandering. He was so weak in body that when he was taken up it was necessary to fan him. Surely, in this state it is absolutely incumbent on the Court to be satisfied that the deceased fully comprehended the nature of an alteration made so suddenly, and in direct contradiction to the principle which had so long regulated his testamentary dispositions.

Within an hour after Mrs. Strode had left the deceased, under the impression that he had finished all his worldly arrangements, Mrs. Brouncker, the wife, came down in great haste and agitation to Mrs. Strode, and informed her that the deceased would have a codicil made to give 5000*l.* more to his younger children :—Mrs. Strode, I doubt not, with perfectly good intentions, but under a great agitation, instead of going up and taking instructions from the deceased, so as to satisfy herself that his memory and recollection were complete, and that he really understood the important change he was about to make in his will in respect to the provision for his younger children, with which, up to that moment, he had appeared satisfied, wrote the

paper in question :—Mrs. Strode deposes that Mrs. Brouncker said, “He wishes you now to make a codicil ; and, apparently much agitated, said, she must come directly, and Mrs. Brouncker said the codicil was for the purpose of making the addition of 5000*l.* to the fortune of the younger children ;—and the deponent having some paper before her, in a rapid manner wrote the substance of what the said Harriet Brouncker then mentioned as the wishes of the deceased, and immediately proceeded with her into the deceased’s bed-room.” She continues to depose, that she carried it to the deceased, who sat in an easy chair, and without any thing being said by the deceased or the deponent, she read over to him what she had written ;—he asked her why she had not written it in the form of a codicil.” Not one word as to the contents, or the reason of the alteration ;—nothing to supply the defect of instructions, and the two ladies themselves appear to have been in such agitation and hurry, as scarcely to have understood what had been intended :—there is nothing to satisfy the Court that the deceased was fully aware of the nature and extent of this alteration in the will ; he merely takes notice of the form. Mrs. Strode goes on to relate that from some observation that fell from the deceased she doubted whether he had not by his will made such additional provision ;” and he was very desirous that the will should be opened, which she strongly opposed, thinking “he would almost have died before the transaction had been com-

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“pleted, and some one gave him wine on account
 “of his exhausted state.”

Now what must have been the state of the deceased's mind, when he could not recollect so important an article respecting his will, made only three days before ;—it is very unfortunate that this lady undertook the transaction, and opposed the looking into the will ;—for, if there had not been so much haste ; if the deceased had gone regularly through the transaction, the Court would have been better satisfied whether he did, or did not, really comprehend the nature of the act ; the relation given seems to negative that he understood the act ;—when he talks of this additional provision, it rather points to the addition (to 2000*l.* under the settlement) after his wife's death ; and, therefore, to a single sum of 5000*l.* ;—for, I do not see how it could properly be said that by will he had made an additional provision of 5000*l.* each, to the 5000*l.* given by the will itself, and exactly in the same manner :—this would be absurd, and it shews such a confusion of mind, that it is difficult to think he could form any intention which could safely be carried into effect as intention of a sound mind :—the deceased was at least in a state of doubtful capacity.

Dr. Fowler the deceased's physician, who has also subscribed the instrument, deposes, “that
 “Mrs. Strode asked him in great haste to step into
 “the deceased's room for a few minutes ;—she said
 “he was desirous of making a *slight* alteration in
 “his will, and had desired her to draw up a codi-
 “cil ;—and it agitated her to death :—they went

“into the deceased’s room,—Mrs. Strode, in the presence of the deceased, said, the deceased wished him to witness a codicil, and was merely making a trifling addition to the fortunes of his younger children ;—the deponent then asked the deceased whether it would not be better to have three witnesses ?—the deceased, apparently agitated and impatient, replied, ‘ it is not lands ; it has nothing to do with lands—it is merely to make a trifling or small addition to the fortunes of younger children.’ The deceased shewed great eagerness to have it done ;—the paper was placed on a table ;—he proposed Mrs. Brouncker to be a witness :—the deceased, in an uncommonly hurried manner, and as if he was working himself up to make an effort, signed his name ;—and the deponent and Mrs. Strode, without any thing further being said, signed their names.”

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To what does all this amount ? that the deceased knew he was doing some testamentary act, so far as to be aware of something of these forms ;—he could call it a codicil ;—he knew it did not pass lands ;—and he could exert himself to sign his name :—but it does not satisfy me that he knew the important alteration he was making ;—that he was doubling the fortunes of his younger children, and leaving his eldest son totally unprovided for :—he hears Mrs. Strode describe it as a trifling addition ;—he repeats that it is a trifling addition to younger children ;—but, instead of that, it is doubling their fortunes ; a bequest of 40,000*l.* :—it shews that the deceased could not have comprehended it. There is not a single dictum from the deceased, either

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before or after this codicil, that he was dissatisfied with the provision made for his younger children ; —there is not one witness who will venture to state that the deceased was of perfect sound mind ;—or, that he fully comprehended the nature and extent of the act ;—it has every appearance of being the sudden thought of a wandering and disordered mind, in extreme weakness of body.

Upon the whole, the evidence is by no means such as satisfies me that the deceased was in possession of sufficient memory and recollection to understand the import of this codicil :—the presumption is in favour of the regular will, executed only three days before. The Court must be on its guard that the real intentions of the deceased are not defeated by the incautious act of the persons about him. I shall act more safely in adhering to the will, as the instrument which is most likely to carry into effect his real wishes and intentions ; and I pronounce against the codicil.

ARCHES COURT OF CANTERBURY.

SMITH v. SMITH.

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Term.
 Nov. 19.

ON the admission of a libel given in by the wife pleading cruelty and adultery against her husband.

Arnold and Lushington, contra.

The charge of cruelty, if proved, would not amount to that which would entitle the party proceeding to a sentence;—it cannot assist the charge of adultery; therefore, all that part of the libel relating to cruelty should be rejected.

JUDGMENT.

SIR JOHN NICHOLL.

The libel is not objected to altogether;—the Court always considers whether the general substance is admissible; if it is, the smaller parts are not excluded. I do not know that the Court has ever laid down where cruelty and adultery are both charged, that it is absolutely necessary to prove the cruelty: it may be of consequence on the question of permanent alimony. In this case I think that the cruelty and adultery are combined together; for the adultery pleaded is of a nature to include cruelty.

Where the wife is the complainant, and the husband to pay the expences on both sides, the

Where cruelty and adultery are both charged against a husband, it is not absolutely necessary to prove cruelty.

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Court will be on its guard not to admit matter that is irrelevant; but it does not appear here that the case is unnecessarily loaded, or containing any matter which may not be of use to assist the Court in its determination.

Libel admitted.

PREROGATIVE COURT OF CANTERBURY.

BROWNING v. REANE.

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 Nov. 21.

JUDGMENT.

SIR JOHN NICHOLL.

Mary Reane, otherwise White, died intestate, in Oct. 1810; James Reane demands administration to her effects as her husband. Thomas Browning, her nephew, and one of her next of kin, denies Reane to be her husband; not denying that a fact of marriage took place, but alleging, that, at the time of that marriage being solemnized, the deceased was incapable, from mental deficiency, to contract a marriage.

Administra-
 tion of the
 effects of a
 wife refused
 to the hus-
 band on the
 ground that
 his marriage
 has been ille-
 gally con-
 tracted—nul-
 lity of mar-
 riage estab-
 lished.

The issue, therefore, in the cause, is, whether the deceased, at the time of the alleged marriage was incapable of legally contracting it; and I am of opinion, that the person alleging that incapacity must prove it, a marriage having in fact been solemnized.

Upon the law of the case there is little question; and, without going back to ancient authorities, it may be sufficient to state what Mr. Justice Blackstone says on the subject:—"a fourth incapacity
"is, want of reason; without a competent share of

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"which, as no others, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and, consequently, that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony; and neither idiots, nor lunatics, are capable of consenting to any thing; and, therefore, the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void."

Here then the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy, or from both combined: nor does it seem necessary, in this case, to enter into any disquisition of what is idiocy, and what is lunacy; complete idiocy, total fatuity from the birth, rarely occurs; a much more common case is, mental weakness and imbecility, increased as a person grows up and advances in age, from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either, or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable,

from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract; though it may not be difficult, in most cases, to decide upon the result of the circumstances; and this appears to be a case of that description, the circumstances being such as to leave no doubt upon my mind.

The case, as laid in the *second* and *fifth* articles of the plea, is to this effect; that she was always from her youth a silly or foolish person, possessing a very weak understanding, which nearly approached to idiocy, and was considered to be, and treated as such; that as she grew older her mental faculties more rapidly decreased, insomuch that for several years, and more especially for the last three years of her life, she was wholly incapable of governing, or taking care of herself or affairs; and that, by reason of her weak and decayed state of mind, she was incapable of understanding the nature of courtship and addresses, or of consenting and agreeing to be married.

It is not denied that, if this case is made out by the circumstances, that the marriage was in law invalid: it becomes, therefore, necessary to examine the circumstances which are proved in respect to the state and condition of the deceased, and the transaction itself.

The age of the deceased is proved to be upwards of seventy; the age of the man about forty: it is

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not controverted that she became possessed of considerable property by her brother's death ; she was the daughter of a baker : it does not appear that she was, in her infancy, in such a state as to exclude all hope of her instruction or improvement, for she was sent to school ; but it does not seem that she was ever able to read, or to write her own name legibly. She was put out as an apprentice to a mantua-maker ; and it is to be inferred from this, that she was thought capable of learning to gain her own livelihood ; but the fact is, she never did learn her business, but was employed as a servant in the house, and going on errands, and looking after the children.

Mr. *Blisset*, examined by the husband, says,

“ He lodged, about thirty years ago, in the house where the deceased served her apprenticeship, and where she was acting as servant ; that she twice called upon him since, about five, and about three months before her marriage ; she told him she was going to be married, and appeared then as capable as when he formerly knew her.” But he enters into no particulars, of what her state was when he formerly knew her. He admits, upon an interrogatory, “ That she was of a weak understanding, but he considered her as capable of taking care of herself.” He had not seen her for nearly forty years ; and, if he is correct in dates, the first of these visits, *viz.* about five months before her marriage, when she said she was going to be married, it was before Reane knew her ; his acquaintance having commenced in December, and she was married on the second of March fol-

lowing; whether this man is Blisset the player, mentioned in another part of the evidence, and whether it be true that the deceased had a child by Blisset the player, is not proved in any satisfactory manner; if it were, this man's credit as a witness would not rest on any solid foundation; but, taking it otherwise, this evidence is extremely slight, and too little instructed with circumstances for the court to rely upon it. Eighteen or nineteen witnesses have been examined, who have known the deceased at different periods of her life, some from her infancy, others at a more advanced period; but it is the latter part of her life which is most important. The statement of some of this evidence will afford the best reasons for the sentence the Court is about to give.

Mary Silcox, aged eighty-five, deposes, "that "she has lived all her life in Avon-street, Bath. "White, a baker, the father of the deceased, lived "in the same street: she has known her from five "years old; she went to school with three sisters "of the deponent's; about ten or twelve she was "put apprentice to one Harper, but on account of "her weakness of mind, instead of being taught "business, she was put to mind Harper's children. "She went afterwards to live with a Mrs. Fry, and "used occasionally to call at the deponent's house. "On the death of Mrs. Fry, twelve or fourteen "years ago, she for some years, while living at "different places, continued to call on the deponent, and complained of being starved; and out "of compassion she took her to live in her house, "about five years ago, where she continued three

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"years; and about two years ago one Mrs. Physic
"took her away, and placed her in some shop, as
"she told the deponent, and where she still con-
"tinued to call; the deceased was always from
"her youth a silly or foolish person, possessing a
"very weak understanding, approaching nearly
"to idiocy, and as such was treated; and her
"mental faculties more rapidly decreased as she
"grew older; during the last years of her life she
"was wholly incapable of governing or faking
"care of herself or her affairs; no rational talk
"could be had with her, for where any one spoke
"to her, or asked her any question, she would re-
"peat the words in a silly irrational manner, in-
"stead of replying to the question; that she could
"not sit in a place for five minutes together, but
"when at meals would get up from her seat, and
"run about the room, and when the deponent said
"to her, 'Molly, you have not eat half your vic-
"tuals,' she would say she had enough, and would
"not abide in the house longer than to have her
"meals. The deponent being confined a good
"deal by gout, had not an opportunity of seeing
"her from home: she has seen her pull up her
"petticoats, and expose her person; and she was
"such a fool she would not mind making water
"before any person; she used very often to want
"to take the deponent's husband round the neck;
"she was worse in her conduct, and more silly,
"after the death of her brother than before; that
"she never could be made sensible of her conduct,
"whatever might be said to her, even in the life-
"time of her brother, who died about five years ago"

"and from whom deponent received a remittance
"of 20*l.* a-year for boarding and lodging his sister."

Mary Turner "knew the deceased as long as
"she can remember; she was a young woman
"when the deponent was a girl; their respective
"fathers had dealings together: the deceased was
"in the habit of coming to the deponent's house,
"and would help herself to any thing as if she
"was at home. Many years ago the deceased's
"brother desired her to look after his sister, which
"she accordingly did, and she used to come to
"her; after which, by his desire, she was placed
"at Weston, near Bath; she clothed her to go
"to this lodging, stripping her the same as a
"child: she lodged in different places in Bath
"with Mrs. Viston, Mrs. Bristow, and another
"person who took Mrs. Bristow's house. She was
"in the habit of coming to the defendant, and she
"saw a great deal of her till a few days prior to
"the marriage. From her acquaintance with her
"she is enabled to depose that the deceased was
"from her youth a silly or foolish person, possess-
"ing a very weak understanding, nearly approach-
"ing to idiotcy, not sensible enough to take care
"of herself, and she was always so considered and
"treated by her own family: after the death of
"her brother, she became worse, or her mental
"faculties more rapidly decreased, notions of her
"being possessed of a great property being put
"into her head, which were too much for her;
"she would sometimes repeat questions, would
"get up in the middle of meals without cause;
"would run about the markets and streets of Bath.

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"Seeing her ill used, the deponent has several
"times taken her home, and finding her violent
"she would be obliged to shake her; boys and
"idle persons used to follow her, calling out, 'Molly
"White, give me a pinch of snuff, where is the fisher-
"man?' alluding to a man in the market, of whom
"she was very fond, and who could not do his bu-
"siness sometimes for her. The person with
"whom she was placed, at Weston, signified that
"she was so troublesome she could not keep her:
"in deponent's opinion she was totally devoid of
"common understanding, and incapable of com-
"prehending the contract of marriage, or giving
"a rational consent thereto."

On third additional interrogatory, this witness
states, "that George White paid for common ne-
"cessaries for the deceased till his death; after
"which Mr. Physic, for Mr. Browning, engaged
"with some person to provide for her: Mr. Brown-
"ing frequently gave the respondent money to
"buy snuff for her."

Thomas Field "sells fish at the Bath market;
"about two or three years ago he first came to
"know the deceased by her asking him the price of
"fish; but he, concluding she did not want any,
"and observing her take snuff, asked her for some,
"which she gave him; that from that time for
"many months she was continually coming to the
"market, sometimes twenty times a-day, and used
"always to come up to the deponent, whom she
"frequently followed to a public-house: he used
"then to hear her called Mrs. Field, which she
"would repeat in a silly way: he first heard her

"called Mrs. White by one Mrs. Turner, who
 "had the care of her, and used to come to drive
 "her out of the market; she used to say to depo-
 "nent, 'Will you marry me?' and on his saying
 "to her 'When will you marry me?' she would
 "repeat the very words. When she came to the
 "public house she would drink the beer of any
 "one; she was a nuisance in the market, though
 "she was worse sometimes than others; for if he
 "did not offer to push her away, and talked to
 "amuse her, she would be quiet: he used to pre-
 "tend to be asleep, and she used to come up and
 "offer to kiss him, and he having flour in his
 "mouth for the purpose, would spout it over her:
 "he considered her as a silly or foolish person, of
 "a very weak understanding, which approached
 "nearly to idiotcy: she was not sensible of the
 "impropriety of her conduct, though sometimes a
 "little steadier than at others, and would take an
 "answer and go away when she was told: he be-
 "lieves she was incapable of consenting to mar-
 "riage, and would have married him fifty times
 "over."

Jane Bristow "knew the deceased eleven years
 "ago, when she lived with Mrs. Fry, in apartments
 "in St. John's Hospital; the deceased was then in
 "poor circumstances, lived with Mrs. Fry, her
 "aunt, on an allowance from her brother: on
 "death of Mrs. Fry, the deponent succeeded to
 "her apartment; the deceased, to whom she was
 "in the habit of giving a penny to buy snuff, used
 "to come daily to her, as well as to others in the
 "hospital, till the day preceding her marriage."

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She then proceeds to give the same account of her conduct and understanding that the other witnesses have given. There are two other women of the name of Light, who lived in apartments in this almshouse, and knew the deceased seventeen or eighteen years, who give exactly the same account. One of them says also, "that she would come into "their apartments when they were drinking tea, "take up their cups, and drink their tea; she "would take things without being asked; she was "guilty of indecencies, but not aware of their im- "propriety; was sometimes turned out of the "apartment, but would return again in a short "time; and that she often talked of going to be "married, but could not say to whom."

Anne Bristow deposes, "that about Lady-day, "1808, in consequence of an agreement between "her husband, brother, and Mr. Physic, the de- "ceased came to board with them, and continued "six months; she used to go out early in the "morning, but return to meals, and to go to bed. "The deponent, being desirous of getting rid of her, "agreed with another woman to take her, but she "still continued to intrude herself into the house; "she found the deceased to be a silly foolish per- "son, approaching nearly to idiotcy; that she never "could have thought she would have been half so "bad, till she came to live with her; latterly, she "was worse, and her faculties rapidly decreasing, "she was incapable of taking care of herself. She "never attempted to clean herself; she never an- "swered any question put to her, but in a silly ir- "rational manner repeated the question that had

“been put to her ; she never sat still a moment ;
 “in the streets the children would hoot her, and
 “pelt her with dirt, and pull her clothes off her
 “back ; that she would pull up her petticoats, and
 “expose her person in the most indecent manner ;
 “if talked to about it, she would laugh and repeat
 “the words. She would talk about her rooms
 “and hide candles and other things : on account
 “of her childish and extravagant conduct, she re-
 “fused to continue the care of the deceased, who
 “was always treated, while under her care, as a
 “person whose understanding was wholly deranged,
 “or unsound and imbecile, that she had not suffi-
 “cient to take care of herself and her affairs. That
 “on her coming for snuff, the day before her mar-
 “riage, she said, ‘Mrs. White, I hear you are
 “going to be married ;’ the deceased replied,
 “‘Going to be married, married.’ She believes she
 “was at that time quite incapable of understand-
 “ing the nature of marriage, and devoid of under-
 “standing.”

Mr. *Bristow*, the husband of the last witness, fully confirms the account.

At the time of the marriage, the deceased lived under the care of Mr. and Mrs. Eyles ; they and their maid-servant, Sarah Edwards, have been examined, and they continued the same account of the condition of the deceased, down to the very day of her marriage.

Eliz. Eyles says,—“Browning worked for her husband, and boarded with them ; and in consequence of his wishing to have a creditable place for the deceased, and saying he would allow 100l.

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“a year for taking care of her, the deponent was induced to undertake the same ; but she had not been a week in the house before the deponent signified that in consequence of her conduct she could not stay there : she continued there eleven weeks, during which time the deponent saw, and was constantly with her ; she used to wash her and put her to bed, for the servant could not manage her at all.” She then gives the same account of her conduct as the other witnesses, and says, “that she could have been made to marry a boy, or any one, or to believe if a post was dressed in man’s clothes, that she was married, and she used to have a great notion of being married. About eight o’clock on the evening before she was married, she came home very much intoxicated ; and the deponent did herself, on account of her ill-using the servant, put her to bed, and never afterwards saw her :—she heard her early the next morning about her room, and in the course of the day, missing her, enquired at Emery’s, and heard she was married.” This account is confirmed by the husband and servant.

In the facts which these witnesses relate, and the conclusions which they draw from these facts, they are perfectly concurrent ; and if they have not given a false account of the conduct of the deceased, and totally deceived themselves, it is impossible not to agree with them in their inferences. A more complete picture of a poor crazy old woman cannot well be drawn than is here exposed ;—totally incapable of doing any one rational act, and never having through life, but particularly in the

latter part of it, held a rational conversation, or done any one act in the management of herself or her property. Any attempt to explain this evidence by the deceased's voraciousness or love of drinking, must totally fail;—in the first place, this sort of voraciousness is rather a sign of the defect of the mind, and frequently accompanies it:—occasional intoxication will as little explain it,—as the witnesses are persons who did not see her occasionally, but who were with her at all times and all seasons, and state her to have been always foolish and deranged. Crazy persons, not having lost the use of speech, and possessing the external senses, can walk about and go of errands, and express their wishes and wants, and have some general impressions; but this poor creature's capacity, especially in the latter period of her life, seems to have been further removed from reason than many animals of the brute creation.

It is necessary, however, to look into the evidence on the other side:—on the first allegation, merely pleading the fact of the marriage, the Court could not expect much that was satisfactory;—if the marriage was brought about by a fraudulent confederacy, there would be two descriptions of persons present at it;—the parties confederating; and those whose presence was necessary, and who might be deceived and imposed upon. Six witnesses have been examined as to the marriage; five of whom were actually present at it. Mr. and Mrs. Emery are two of them, who kept a retail shop at Bath, where the deceased used to buy snuff;—they are the friends of the asserted husband;—the whole

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matter of the marriage was contrived at their house;—there the courtship, whatever it was, was carried on;—from thence they went to the church, and thither they returned after the ceremony. It is admitted that none of the friends or connections of the deceased were in any degree privy to the transaction:—clandestinity is the usual concomitant of fraud. Emery admits her great infirmities, her habit of drinking, and her indecent behaviour,—but he attributes all her irregularities to her habit of drinking;—he admits, that on the evening of the marriage he went with the parties to the Cross Hands, where the old woman was extremely intoxicated, and that on the bridal-night they all three slept in a double-bedded room. Here then is a young man, in the middle of life, marrying an old woman of seventy, an habitual drunkard, and labouring under great infirmities, but possessed of a considerable property, which is to be acquired by this marriage, without the knowledge of any of her friends, or any settlement or security whatever. Upon uncontroverted facts the case has an unfavourable aspect, and has much the appearance of fraud and confederacy. Motives will not invalidate the act, however improper it may be, if the party was capable of acting for herself; but they excite the suspicion of the Court, and it will require evidence of capacity from other witnesses not concerned in the transaction; nor will it think the testimony of Mr. and Mrs. Emery deserving of much credit when it is opposed to a cloud of witnesses who give a description of the state and condition of the deceased, irreconcilable with their account.

"*Martha Solway* never saw the deceased but "once before the marriage, did not know her name, and has never seen her since; she was "asked to attend the marriage by Mrs. Emery;" —whether she is to be regarded as a confederate, or as a person imposed upon, her evidence is of no weight, for she says that the deceased and the other persons held no conversation; and the single observation she recollects, is, that when the witness offered the deceased her arm, she said, "No, she would take her husband's." This goes affirmatively a very short way; but negatively, it is strong, that during the time she was in the deceased's company she can set forth no other expression that she used, and can assert that she entered into no conversation. The remaining three witnesses are the clergyman, the clerk, and the sexton; and the main fact relied upon is, that she went through the ceremony;—that alone cannot be held sufficient; if it were, no marriage could be invalidated, unless all the parties were confederates in the fraud; there is no reason to charge the officiating persons as confederates, but as persons deceived. He must be a careless observer of human life who does not know that foolish crazy persons, of this description, have yet some degree of cunning and docility;—this poor creature, whose notion was to be married, and whose common question was, "Will you marry me?" by a very little tuition, might be trained and instructed to go through the formality of the ceremony, though wholly incapable of understanding the marriage contract, without persons, previously unacquainted with her, discovering her incapacity;

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the solemnity of the place, and the occasion, of which she might have some general impression, would render her more tractable and orderly. Her appearance however did not wholly escape the notice of the clergyman, though he was lulled by the answer given to his enquiries.

Dr. Phillot says, in answer to the fourth interrogation, "That previous to the ceremony, he observed to the sexton that she was rather weak ; and his answer was, that he believed her a well-disposed woman, and that she attended prayers at church every day, always behaving herself with decency." The mere circumstance, however, of attending church constantly, and behaving with decency, is no proof of capacity, for it has come under my own observation that a person more nearly approaching to absolute idiotcy than any which has ever happened to occur to my notice, always attended church, and behaved decently ;—the sexton does not pretend ever to have had any conversation with her. It appears also that the deceased had some degree of deafness, and thickness of speech ; and that at the beginning of the ceremony, where she was to repeat after the clergyman, he was apprized of this defect, in order that he might speak louder. These defects would further lull his observation, and induce him to attribute her appearance to them rather than to want of capacity.—*Dr. Phillot* proceeds, "That after the marriage he asked the clerk who she was ; who told him she formerly had an illegitimate child by *Blisset* ;—that he understood she had an annuity, and he supposed the man must

"have married her for that;—he asked the deceased, if she could write, to sign the register; she said she could;—but, upon seeing the name unintelligibly written, he added, '*the mark of Mary White.*'"

Skrine, the sexton, says, "that he never spoke to her till the time of her marriage, on which occasion she said to the respondent, '*This is my husband,*' pointing to the prosecutor, and smiling."

This is the whole of the evidence, applying to the condition of the deceased at the time of the marriage; and the circumstances are so equivocal and unsatisfactory that the Court would have no great difficulty in its conclusion, if it stood on these alone. But whatever might have been that difficulty, it would be removed by the subsequent part of the case. *Reane* has had a full opportunity of producing other evidence, and going into proof which should repel that of the next of kin, and shew that they had given a false representation, or come to a false conclusion. And what makes the absence of such proof more forcible, is that there could be no difficulty in producing it, if the deceased had been a capable person. The deceased did not live in a state of seclusion;—of all persons she seems to have been most the object of observation; the whole of her life was passed in Bath;—she was never at home but at meals; the rest was passed in the abbey church,—in the market-place,—in the public streets of that great city;—in these she was every day, and the whole day. If she had been capable of taking care of herself, or of the

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most ordinary conversation, fifty or five hundred witnesses might have been produced to repel the evidence produced by Browning. Reane did give in a long allegation contradictory of the case set up by the adverse party;—upon that allegation he has examined six witnesses;—of these six, two only had ever seen the deceased before the marriage; one of them is Mr. Blissett, who has been already noticed, who has seen her only twice within the last 30 years. The other is a day-labourer's wife, brought from Upton, in Gloucestershire, who says, "that she has known the deceased for 30 years, "and to the time of her death: after her brother's "death the deceased was generally employed in "going about on errands at Bath, where she often "met her:—that she talked as other people would "do, and did not repeat questions." This witness, it is to be observed, lived 15 miles from Bath.

The absence of evidence, under the circumstances; is the strongest possible confirmation of the evidence given by the next of kin.—Another species of evidence, always the most forcible, is the conduct of the deceased herself;—if, throughout life, she had managed herself and her affairs, it would have afforded proof of her capacity: though not in actual confinement, she appears to have been in a state of pupillage, never a person *sui juris*—not proved to have done any one act of business, or to have entered into a contract of any sort.—She was put out an apprentice, but fails to learn her business so as to get her own livelihood. Her brother supports her with common necessities, not by allowing, or paying her money, but by paying

other persons to take care of her.—After his death, though she became entitled to considerable property, yet she never had the use or possession of it; it is her nephew, or his agent, Mr. Physic, who agrees with people to take care of her. She is washed, and cleaned, and put to bed by others.

Having taken this view of the case up to the time of the marriage, it seems unnecessary to pursue it further with any degree of detail; but the sequel is exactly of the same character: the same strength of evidence on one side, coupled with conduct, and encountered by nothing of any force or effect on the other.

Upon the evening of the marriage Reane and his friend Emery take the old woman in a return chaise, to an inn about twelve miles from Bath, called the Cross Hands: it is not worth while to examine whether she was, or was not intoxicated when she arrived there, but she is not treated as a person having understanding;—she joins in no conversation;—she is carried up to bed, and undressed by the chambermaid;—she will have her bonnet laid on the pillow. Reane and Emery, it is admitted, slept in the same room with her; though Emery denied that they slept in the same bed:—the next morning very early they carry her off in a chaise towards Gloucester; Reane having been waiter at an inn there, and not choosing to exhibit her, they leave her at a little public-house, a few miles from that town. On the following day they return to the Cross Hands, and again sleep there in the same two-bedded room. On the next morning Reane applies to the landlord to get some person to take

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charge of the deceased for a few days till he could provide a proper place for her. The landlord having known Mr. White, the brother, who used to mention to him his foolish sister, out of respect to him offers to take charge of her for a few days; —Reane accordingly goes away, leaving her in his hands. While there, she conducts herself in every respect as a silly childish person, and is treated as such, and they are obliged constantly to watch her; —she would go into all the rooms of the house, and take whatever belonged to the guests. She went up to all the carriages that stopped; —she accosted the coachmen and drivers, and strangers, clasped them round the neck, and called them her husband: she asked him for “money, money,” and the landlord gave her a post-horse ticket; she put it up safely, and supposed it to be a bank-note. In short, she became such a nuisance, that on Thursday the landlord wrote to Emery to desire Reane to come and fetch her away; and on Saturday, Reane, with another man, (who turns out to be a sheriff’s officer) fetched the deceased away, and carried her to Bristol.

These circumstances are very fully proved by several witnesses; at the inn at Bristol, which was kept by a friend of Reane’s, the deceased remained several months; —there a young woman, named Sarah Silon, was hired to look after her, as a childish person, and she is treated as such both by Reane and Mr. and Mrs. Griffiths. Silon gives an account of the deceased’s conduct exactly corresponding with that of the Bath witnesses. —She is confirmed by her mother, to whose house, at the

end of six months, the deceased was removed, and there she died. They are corroborated by Arnold, a whitesmith, living in the neighbourhood, to whom she appeared a silly person, always attended by Sarah Silon as a guard. Griffiths and Peachey are produced to represent the deceased at this time as, in their opinion, capable:—they are the agents and partisans of Reane, and their depositions make no great impression on my mind. Mr. Scott, a surgeon, who attended the deceased three times, about five months after her marriage, for a contusion in the temple, and an inflammation in the eye, deposes—“That he observed no symptoms of “insanity, or idiotism: that the deceased being “rather deaf, he spoke loud, and she seemed at- “tentive and answered in a rational manner; but, “having a fullness of mouth, disenabled her to arti- “culate her words perfectly; that she was attended “by a female servant; that Reane appeared atten- “tive to her, and she was very partial to him.”

He does not state what his conversation with her was, so as to enable the Court to judge whether he had any grounds to form his opinion: it is mere negative evidence, that he did not discover her incapacity. Attending her for an external hurt, it was not necessary that he should ask questions about her mental infirmity;—the deceased also, being rather deaf, and having a thickness of speech, and the husband and attendant being both present, it is not at all probable that such conversation should have taken place between the surgeon and the deceased as should have enabled him to judge of the state of her mind.

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With respect to the whole of the transaction, there is the same deficiency of evidence as before. No person can set forth the particulars of one rational conversation ;—no person appears, who has had any social intercourse with her ; who has ever visited her, or has been visited by her ;—no one act of business is spoken to ;—no buying, or selling, or hiring, or ordering ;—no appearance of self-dominion,—of the care and management of herself. But as the brother, and afterwards the nephew, had taken care of her before marriage, now Reane takes care of her, providing the common necessities of life for her subsistence.

In addition to all this a writ *de lunatico inquirendo* was taken out and executed six months after her marriage ;—the verdict was found by a most respectable jury, consisting of twenty-one persons ;—the deceased was produced in person,—Reane's counsel and solicitor attended ; and, after examining her in person, they found her incapable from two years antecedent. No attempt has been made to impeach this verdict in Chancery ; nor have the counsel, or the solicitor, been examined in this cause.—If this inquisition had been taken before the marriage, it would by the statute (*a*) have been conclusive against it—though not conclusive certainly against a will. But, taken after the marriage, and under the circumstances stated, the deceased having been produced in person before the jury, it is a strong confirmation, if confirmation were wanting, of the other evidence.

(*a*) 15 Geo. II. c. 30.

Without the verdict, however, and looking only to the evidence adduced in this cause; in the view I have taken of it, I have no hesitation in pronouncing against the interest of the asserted husband; and, under the impression I have received, it would be quite inconsistent with the conclusion to which I have come on the merits of the case, not to make it a part of the decree to condemn Mr. Reane in costs; and accordingly I condemn him in costs.

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ARCHES COURT OF CANTERBURY.

TURNER, falsely called FELTON, v. FELTON.

*(By Letters of Request from the Official and
Commissary of the Peculiar of Hornchurch,
and Liberty of Havering de la Bower.) (a)*

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Nullity of
marriage by
reason of the
minority of
the husband,
established at
the suit of the
wife.

CHARLES FELTON was married to Mary Turner, by a licence obtained on his oath, in which both the parties were described as being upwards of twenty-one years old.

On the 18th of November, 1811, the wife instituted proceedings to annul this marriage, on the ground that the husband was a minor at the time of the solemnization of it. A citation was taken out against Mr. Felton, and regularly served upon him; but no appearance being given for him on the first session of Hilary Term, 1812, the Judge signed a schedule of excommunication against him, but directed it not to go under seal for fourteen

(a) The Peculiar of Hornchurch and the Liberty of Havering de la Bower, in the county of Essex, belongs to the Warden and Fellows of New College in the University of Oxford, who exercise their jurisdiction by a Commissary.

days. Mr. Felton could no where be found; but notice was sent to his solicitor that the excommunication would be published, unless he gave an appearance.—At length Thomas Saunders appeared, and stated himself willing to undertake the guardianship of the minor cited, for the purpose of defending this suit, and the Judge, at his petition, assigned him guardian for that purpose.

A libel was given in by the wife, and several witnesses were examined upon it, who proved that Charles Felton was born on the 21st of November, 1793, that his father died intestate, that his mother had married Mr. Harpur previous to his marriage, and that no guardian had been appointed by the Court of Chancery. It appeared also by the evidence of his mother, that he was an illegitimate child, for she stated that she had never been married to Mr. Felton, his father.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit for nullity of marriage, brought by the woman;—the man is still a minor. The Court excommunicated him to compel a lawful appearance;—a person, however, appearing ready to take the guardianship, the Court *ex officio*, appointed him, with the consent of the proctor, who had been appointed by the minor.

Under such circumstances, the Court would naturally look carefully into the case, considering it in some degree as an *ex parte* proceeding. But the woman is not to be defeated of justice;—the licence was not taken out by her, it was procured by the man:—not by her perjury. The fact of

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the marriage is proved by a person present, and by the register to have been solemnized on the 17th of March, 1811. The birth of the husband is stated to have taken place in November, 1793,—his baptism in April, 1794 ; therefore, at the time of marriage, he was not much above seventeen. His mother speaks to his birth ; and she is the best witness to that fact, if she is credible : but the Court was alarmed at first at finding no other witness to the age ; I see nothing, however, to make me suspect collusion. The mother is confirmed by the register, which has been collated by the witness who speaks to the identity. The register mentions not only the baptism, but the birth.

Therefore, on the evidence of the mother, confirmed by the register, I think the fact is proved.

The questions remaining are, if he was a bachelor, and there was want of consent. He describes himself as a bachelor in the entry of his marriage, and his mother speaks to the same fact. The mother deposes that the father died intestate ; she does not mention his name,—states that the child was illegitimate, and that at his marriage she was married ; —If he was illegitimate, there could be no testamentary guardian : a search has been made in the Court of Chancery, and no guardian was appointed there. The mother could not give consent ; and, even if she had been competent to this, she did not know of the marriage.

On the whole, observing all the caution which the circumstances call for, I think the necessary facts are proved ; and I pronounce for the nullity.

OTWAY v. OTWAY.

(By letters of request from the Consistory Court
of Peterborough.)

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Dec. 10.

SARAH CAVE, the daughter and heiress of Sir Thomas Cave, Bart., of Stanford Hall, in the county of Northampton, was married on the 25th of Feb. 1790, to Henry Otway, Esq. The parties cohabited together till the 13th July, 1811, when Mrs. Otway quitted her husband's house; and on the 18th of November, 1811, she took out a citation against him in a suit for divorce, on account of cruelty and adultery. Her charges against him were set forth in a libel of twenty-five articles;—sixteen witnesses were examined in support of them: The answers of Mr. Otway were taken to the libel; and interrogatories were put on his part to the witnesses produced by his wife, but he gave no responsive plea.

A separation
à mens et to-
ro decreed,
on account
of the cruelty
and adultery
of the hus-
band.

Swabey and Jenner for Mrs. Otway.

Both charges in the libel are proved; and, consequently, a divorce must be decreed on both grounds. There is no proof, we admit, that Mr. Otway ever struck his wife; but a separation may take place for cruelty where no blow has been struck, particularly where there is, as here, a joint charge of adultery and cruelty.

*Michaelmas
Term.*

OTWAY
v.
OTWAY.

In *Robinson v. Robinson*, (a) ill-nature, violent passions, and frequent abuse of his wife, were proved against the husband from the time of his marriage:—he had frightened her so as to occasion several fits of illness; he refused her medical assistance; in short, he has been a bad husband, but had not beat his wife:—that charge was not brought against him: several instances of adultery were proved, and the Court pronounced for a divorce on both grounds.

Arnold and Adams contrò.

We admit the adultery to be established, but deny that there is any proof of cruelty;—opprobrious language is not cruelty; and this is the utmost that is proved, there is no instance of menace or violence.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit brought by Sarah Otway for a divorce, on account of the cruelty and adultery of her husband: the marriage took place in 1790; the parties cohabited together chiefly at Stanford Hall, till July, 1811. The husband was a country gentleman; the wife, the daughter of Sir Thomas Cave, Bart.;—she had nine children by him.—This gentleman, living with his wife, with daughters nearly grown up, is proved to have made his own house a brothel.

Mary Lawrence, a young girl not eighteen, was debauched by him; the fact is incontestibly proved;—so that on this fact alone the wife would be entitled to a divorce.

(a) Arches Court, 1728; before Bettersworth.

Another fact amounts nearly to a rape ; the account given by the woman is confirmed by another person to whom it had been admitted. A third instance is proved by Gaudern, his steward, who was employed to get lodgings, and to maintain the party.

This was in June, 1811, just before the separation.

A more profligate case of adultery cannot be made out,—this being so fully proved, it is not necessary to scan with exactness the charge of cruelty—acts of personal violence are not proved—but a series of most unwarrantable behaviour is. The case cited shows that it is not necessary to prove acts of personal violence to substantiate a charge of cruelty ;—it is the acknowledged doctrine that danger to the person and health is sufficient. The wife pleads a state of delicate health, this one of her interrogatories is said to contradict :—she might have been strong originally, but after having had nine children, and borne such treatment for so many years, it was natural she should become nervous.

Many of the servants who have been examined, prove Mr. Otway to have been in the habit of putting himself into passions, of following her from room to room, abusing her, calling her by the most opprobrious names, accusing her of adultery, and incest. I do not consider this as mere abuse, it implies menace.

Part of the evidence on the fourth article is objected to.—I do not consider it (a) (as it has been

(a) The 4th article pleaded, “ That shortly after the marriage the said Henry Otway began to treat his wife, who was of a very delicate constitution, with indignity, severity, and cruelty ;

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Michaelmas
Term.

OTWAY
v.
 OTWAY.

contended to be) a mere general article not to be examined to, or as merely going to the character of the party, which is now discontinued in practice ; but it pleads the habits of the husband in abusing his wife, and in that view it is proper to be examined to :—it might have been met by the husband by pleading that such was not his habit.—Therefore, I consider this evidence as properly taken. There appears to have been no provocation whatever on the part of the wife ; all the witnesses state this upon the interrogatories, except Gaudern, his steward, who has been brought before the Court by a compulsory,—Mrs. Otway is proved to have been so much terrified and alarmed by his conduct as twice to have quitted the house :—she came back, it is true ; but this is not extraordinary, for she had seven children ;—but her health has been materially affected :—she had fits afterwards from his violent conduct, and he would not suffer her to have medical attendance till he was told she was in danger. The apothecary says, he put himself in such passions as to alarm him lest he should commit violence ;—then what must have been the fear of a nervous woman ?—she declared her fears for her personal safety ; and on one occasion on recovering from a fainting fit she exclaimed, “ Do not let him come near me.” So Jackson speaks to a menace, and his saying, “ I will murder you ;”—the next morning after this

abused, and called her opprobrious names ; swore at her, spit in her face and threatened to beat her, to pull her nose from off her face, and to shoot her ; and ordered her to quit his house, and declared he was determined she should go.”

she quitted the house. He had been in a passion about his daughter's going out. In the deposition of the witness who speaks to this fact, the menace is not mentioned. On the interrogatories he is asked if he believes Mrs. Otway quitted the house on apprehension of ill-treatment; and, on his being called upon to speak more particularly, he states the menace.

It is objected that she could have no apprehensions, for she had lived with him 20 years, and no damage had ensued;—but I have yet to learn that such passions, so indulged in, do not increase.

If no adultery had been proved, I am not prepared to say that a sufficient ground has not been shown for a separation;—but the adultery in this case is connected with the cruelty: the Court cannot separate the one from the other.

I pronounce for the separation as prayed.

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Term.

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v.
OTWAY.

PREROGATIVE COURT OF CANTERBURY.

V 1812.
Michaelmas
Term.
Dec. 13.

WILLIAMS v. WILKINS.

Cæteris paribus, a man accustomed to business preferred as an administrator.

JUDGMENT.

Sir JOHN NICHOLL.

Twelve persons are entitled in distribution,—*cæteris paribus*, a man of business is more proper. The parties applying for administration are Mrs. Williams, who lived with the deceased, and managed his affairs; and Mr. Wilkins, who was his partner in a banking-house. The Court would not willingly give any person a power of looking into the affairs of this banking-house. There is no imputation against Mr. Wilkins;—it is not likely he or his partners would make up a false account;—by far the majority of the next of kin are satisfied with Mr. Wilkins.

It has been relied upon in argument, that in a former will he had left Mrs. Williams property;—but he had abandoned that will, and consequently that intention:—the circumstance, therefore, is immaterial. The point now is, not whom the deceased would have chosen for his administrators, but who is most proper for the office. Eight out of twelve of the next of kin are for Mr. Wilkins;—three are silent;—though this expression of their

opinion is not binding on the Court; still, unless the person on whom the majority fixes, is an improper person, it outweighs the other considerations which have been urged.

Mr. Wilkins I think the most proper person to have the administration; and I decree it to him.

1812.
Michaelmas
Term.

WILLIAMS
v.
WILKINS.

1813.
Hilary
Term.

CONSISTORY COURT OF LONDON.

Jan. 26. **DOBBYN v. CORNECK, falsely calling herself
 DOBBYN.**

A libel plead-
 ing the inter-
 position in
 banns of a
 christian name
 by which the
 woman had not
 been known,
 as a ground
 of nullity,
 admitted to
 proof.

WILLIAM AUGUSTUS DOBBYN and Maria Corneck, being both minors, were married by banns, on the 19th of November, 1810, in the church of Newton St. Loe, in the county of Somerset:—one child was born of this marriage.

On the 24th of April, 1812, Mr. Dobbyn instituted a suit of nullity of marriage against his wife, on the ground that he was married under the name of William Augustus Dobbyns, and she under that of Maria Philippa Corneck, whereas his real name was William Augustus Dobbyn,—and hers Maria Corneck.

The 7th article of the libel pleaded, “That in the months of October and November, 1810, William Augustus Dobbyn resided at the house of his mother, situated in South Parade, in the parish of St. James’s, in the city of Bath, and that during his residence there, he became acquainted with Maria Corneck, who then resided with her mother Henrietta Corneck, who lodged in Stanhope Street, in the city of Bath; and it being well known to Maria Corneck, that the mother of the said William

Augustus Dobbyn was averse to, and had refused her consent to a marriage between her and her said son, and also that William Augustus Dobbyn was then a minor, and under her guardianship, yet she did propose and prevail upon the said William Augustus Dobbyn to consent to be married to her out of Bath, and by banns; and, still the more effectually to prevent the publication of the said banns from being known to his mother, did fraudulently procure the publication thereof to be made as between William Augustus Dobbyns and Maria Philippa Corneck, which additional name of Philippa she then first assumed for that purpose, and that banns of marriage were accordingly published, in the parish church of Newton St. Loe, in the county of Somerset, between William Augustus Dobbyn and Maria Corneck, by the names of William Augustus Dobbyns and Maria Philippa Corneck, instead of by the only true names of the said parties."

Arnold and Phillimore for Mrs. Dobbyn.

The libel is inadmissible, as it does not lay sufficient ground for raising a question as to the validity of this marriage. Fraud is alleged in the publication of banns; but if there was fraud, the husband must have been a party to it.—Then as to the nature of the fraud; it is stated that they were not married by their true names—this we deny—Maria and Corneck are the true names of the woman;—Philippa is mere surplusage;—no fraud could be intended or assisted by the introduction of that name:—and whether the husband was called Dobbyn or Dobbyns must be immaterial: it could

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*Hilary
Term.*

DOBBYN

v.

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Hilary
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DOBBYN
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CORNECK.

not affect the publication of the name so as to disguise the person from the auditors.

The parties have cohabited since 1810, there is no disparity of age, or condition of life ; and if all the facts charged in the libel should be proved, the Court must sustain the validity of the marriage.

Swabey, contra.

The law requires the true names in the publication of banns ;—the parties in the present case were both minors ;—the intention of the marriage act was not only to protect the natural rights of parents, but to guard the infants themselves from improper connections :—this is an undue publication :—an undue publication will vitiate a marriage, On this ground the libel is entitled to be admitted to proof.

JUDGMENT.

Sir WILLIAM SCOTT.

This is a proceeding instituted by William Augustus Dobbyn to set aside his marriage, under the circumstances pleaded in the libel ;—it is stated that he was a minor, that there was a misnomer in the banns,—and that he was not married in the parish where he resided ;—this last circumstance however is excluded from the consideration of the Court under the strong terms of the statute, which enacts that no evidence shall be received as to this fact, after a marriage has taken place.

The facts principally relied upon are the variations in the names of the parties—one I think cannot be admitted to be sufficient to affect the validity of the marriage ; the use of Dobbys for Dobbyn :—it is impossible, but that any one of the family

being present at the publication, and hearing the name, could have thought it to be any other than the same person.—I, therefore, throw this quite out of consideration.

1813.
Hilary
Term.
DOBBYN
v.
CORNECK.

The other variation is more important, that the banns of the woman were published under the names of Maria Philippa Corneck, her names being Maria Corneck only:—it is pleaded that this was fraudulently done; I accede much to the observation that this name of Philippa could hardly have had the effect of deceiving, or misleading, any person, by being used together with the other names.

What fraud was used? What are the inducements to it? What the woman personally did, is not set forth.

I think I may admit the libel without at all laying down what my final determination may be.—Certainly it is a suit not entitled to encouragement; there is no disparity of age, or of condition:—there is no complaint on the part of the guardian of the minor;—there is no ground to say that the man is subject to the imputation of fraud.

Preliminarily, I must say, that the suit is not likely to lead to the conclusion prayed; at the same time I will not exclude the party from going into proof.

I shall admit the libel. (a)

(a) No witnesses having been produced to prove the libel, the judge, on the 25th of May, 1813, dismissed Mrs. Corneck from all further observance of justice in this cause.

1813.
Hilary
Term.

ARCHES COURT OF CANTERBURY.

Jan. 28.

COLE v. CORDER.

(An Appeal from the Commissary Court of Surry.)

In defamation suits, it is not necessary that two witnesses should speak to the same words being uttered in precisely the same terms.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit for defamation, brought by Jane Cole against John Corder,—it is brought here on the same evidence, on which it was heard in the Court below :—In that Court it was dismissed with costs.

It is sometimes said, that suits of this kind are to be discouraged by the Courts ; and when suits arise between persons of the lowest description, the Court may lament that the parties should incur a ruinous expence : but it is necessary that the law should interpose to prevent the effects of malevolence ;—and the law gives no remedy, but by an application to this Court.—In the present instance, the parties are in the middling rank of life :—it is necessary that there should be a remedy for a real injury.—The law requires proof of the defamatory words by two witnesses—but not that they should

speak precisely to the identical words in the same terms :—allowance must be made for inaccuracy of recollection at a distance of some time from the date of the transaction.

The witnesses both agree that the defendant called some woman a whore and strumpet; the libel lays the epithet “damned whore,” they do not agree in this—which is immaterial; the epithet had better not have been pleaded.—But the only question is, whether the word referred to the party before the Court.—It never can be maintained, that it is necessary that the defendant should mention the name of the person defamed; otherwise the most malicious defamation might go unpunished :—it would be more aggravated by contrivance :—it is sufficient, if it is made out to the satisfaction of a judge in a defamation suit, as to jury in the case of a libel at common law.

John Stock, the first witness, states, “That he “became a bankrupt, and that Corder was his assignee ;—that, at a meeting of the creditors, he “exhibited his account, and it appeared that a “large sum had been paid to John Cole, and “Jane his wife :”—Corder said, “This is the way “the money has been expended by or on a woman, “who is a common whore, connected with a “set of swindlers ;”—From referring to the circumstances, there can be no doubt but that he meant Jane Cole.

George Fair was present with Corder on “an “occasion of a meeting at a coffee-house—he spoke “of Jane Cole in opprobrious terms, and called “her strumpet ;”—which, though not part of the

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*Hilary
Term.*

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Term.*

{
 COLE
 v.
 CORDER.

defamatory words, may explain to the Court who was meant by the words spoken.

“At another time, he states, that he was present at a meeting, when Corder animadverted on the payment and expenditure to Cole—and said that the Bedford Place establishment was kept at the public expence, that she (alluding to the articulate Mrs. Cole) was a common whore, and he did not believe that there was any Mr. Cole;—he adds that he believes Mrs. Cole was a person of good character, and injured by the defamatory words.”

When the witnesses coincide as to these facts, and agree in stating the defamatory words of some one, upon such a charge in the accounts—that such a reflection was made on the expenditure for the Bedford Place establishment, where Jane Cole lived—and that he did not believe there was any Mr. Cole;—can the Court entertain any doubt, *i. e.* any judicial or conscientious doubt, that Jane Cole was the person alluded to:—added to this, there is no denial of the charge: no attempt to explain away the words;—several persons were present, whom the party, if he had pleased, might have examined.

The words were not confined to a hasty expression,—at the first moment,—they were repeated on other occasions.

The Court is not reluctant to apply the remedy which the law enjoins.

I reverse the sentence of the Court below,—pronounce the libel to be proved,—and condemn Corder in costs in both courts.

OTWAY v. OTWAY.

1813.
Hilary
Term.
Jan. 28.

JUDGMENT.

Permanent
alimony.

SIR JOHN NICHOLL.

In this case, Mrs. Otway has succeeded in obtaining a sentence of separation from her husband in a suit brought against him for cruelty and adultery.

The question of permanent alimony was reserved, and now comes before the Court for its decision, and it is my duty to allot to the wife out of the joint income a fit allowance for her separate maintenance.

The principles, upon which the Court is to exercise its discretion, have been so recently laid down in the case of *Cooke v. Cooke*, (*a*) that I do not think it necessary to repeat them again at any length.

Undoubtedly, a much larger allowance is to be made for permanent alimony, than for alimony pending suit ;—the delinquency of the husband is now established ; the wife is the injured party :—she is separated from the comfort of matrimonial society, from the society of her family, not by the act of Providence, but by the misconduct of her husband ;—she must be liberally supported. The law has laid down no exact proportion ;—it gives

(a) See page 46.

1813.
Hilary
Term.

OTWAY
v.
OTWAY.

sometimes a third,—sometimes a moiety ; according to circumstances.

In Lord Pomfret's case the income was 12,000*l. per annum*, the alimony given was 4,000*l.* : in that case the larger part of the fortune had come from the wife, and there was no family ;—but he was a peer and had that rank and dignity to support.

In Taylor v. Taylor (b) [a moiety—in Cooke v. Cooke (c) about a moiety, were given—in these cases there were no children.

In the present case the joint income amounts to 5,500*l. per annum*. The greater part of this property came from the wife—the delinquency of the husband is very gross.—I should be disposed to give as large a proportion as in any case ;—if no third parties were concerned, I should give a full moiety—but there are six children, two sons and four daughters, whom the father is bound to maintain and educate ;—the suitable education for such a family will be a considerable expence ;—supposing that deducted, the sum I shall allot will give the wife about a moiety of the remainder.

I shall allot 2,000*l. per annum* to be paid quarterly from the date of the sentence.

It appears that there are deductions from the estate from two jointures of 1,500*l.* each ; when they fall in, it will be open to the wife to apply for an increase of alimony.

(b) Arches, May 14, 1796.

(c) Arches, June 25, 1812. See page 40.

CONSISTORY COURT OF LONDON.

1813.
Hilary
Term.

Feb. 3.

HARRIS *v.* HARRIS.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit for separation by reason of cruelty, brought by the wife:—There is no defensive allegation on the part of the husband. It is not the habit of the Court to interfere in ordinary domestic quarrels; there must be something which makes cohabitation unsafe; for there may be much unhappiness from unkind treatment and from violent and abusive language; but the Court will not interfere—it must leave parties to the correction of their own judgment—they must bear as well as they can the consequences of their own choice.

The cruelty of the husband established, and a separation *à mens et toro* decreed at the suit of the wife.

Words of menace are different; if they are likely to be carried into effect, the Court is called upon to prevent their being carried on to mischief.—Where blows are resorted to, the case is still more aggravated, there mischief is actually done, or inflicted to a certain degree.

In the present case it is impossible not to say that there is that species of misconduct which the Court notices.

1813.
Hilary
Term.

HARRIS
 v.
 HARRIS.

It is proved that for a considerable time the husband used towards his wife words of the most insulting nature; and that they were constantly used.—This is proved by the evidence of the servants who appear to give impartial testimony, allowing the husband credit for affection to his children, but stating his misconduct towards his wife. I see nothing to lead me to impute undue favour or partiality towards him.

The first matter complained of is an actual blow, though there is no direct evidence of it. What leaves the Court fully satisfied that it did occur, is the blow in 1803. Her two sisters say that at that period she abstained from her usual visits to them for some time. When she came, they saw marks, and asked her the cause of them; she declined at first to answer their questions, and did not appear eager to complain, but when pressed she said she had received a blow from her husband with a poker:—this confession of hers confirms the statement made at a later time that her husband had struck her before, which must either allude to this blow, or it adds to the number of acts of violence complained of.—She bore all with the patience required of a wife—she was degraded from the management of her family;—dressed not suitably to her situation in life;—obliged to resort to the charity of her own family for a supply of money.—“Fool,” “Devil,” and “Liar,” were the best terms applied to her:—words of menace are also proved;—he would threaten to throw a knife in her face, when he had a knife in his hand;—

he would threaten to knock her head off; words which to a mind of greater firmness than her's would occasion alarm.

It has been suggested that she had habits of contracting debts, which justified him in taking the management of the family from her; but when I see the manner in which she was kept, as to her own clothes, I do not think these habits others than the husband himself occasioned, if they are true; but they are not satisfactorily proved.

The subsequent facts are clearly established: On the 11th of Aug. there was a quarrel on account of the allowance her father had given her for her own accommodation;—the husband wanted to apply this to the use of the family. I do not see that her application of it was other than was intended by her father.

On Sept. 11 there is satisfactory evidence of a blow from a tea-cup; the child came down stairs, and said her father had thrown a tea-cup at her mother—the witness went up stairs, and found the cup broken, and her face bleeding—he asked the witness what she had heard about it—she told him, and he did not deny the statement—his silence here leaves no doubt of the fact.

On the 14th of Oct. was the last outrage which led to their separation; it happened in the presence of the husband's sister;—the dispute arose about the testamentary dispositions of her father—it is a singular circumstance that the sister says she leaned her head on her hand, and did not see the parties.—The husband, however, by his

1813.
Hilary
Term.

HARRIS
v.
HARRIS.

1813.
Hilary
Term.

—

HARRIS
v.

HARRIS.

own admission to another person, thrust his fist into her face with some violence.

The Court is called upon to prevent the repetition of such occurrences—I have no hesitation in pronouncing for a separation.

PREROGATIVE COURT OF CANTERBURY.

BUDD *v.* SILVER.1813.
Hilary
Term.
March 13.

JUDGMENT.

Sir JOHN NICHOLL.

The deceased is Anne Prime, who has died leaving a testamentary paper, not disputed, but in effect merely declaring an intestacy. There are nine cousins equally entitled in distribution—of these Budd and Silver contest the administration;—four of the next of kin join in Budd's prayer,—three in that of Silver, so that Budd has a majority of interests. Where there is no material objection on one hand, or reasons for preference on the other, the Court, in its discretion, puts the administration into the hands of the person with whom the majority of interests are desirous of entrusting the estate.

There is no objection to Budd's character, or his competency:—the only point argued is, that his competitor is a person of superior situation in life, being an alderman of the city of Winchester; whereas Budd is only a small shopkeeper in that city:—but, independently of the majority of interests being in Budd's favour, there is another reason why he should be preferred; for it seems a

Where there are several next of kin in equal degrees, administration is granted to the person who unites the majority of interests, unless there is some ground of objection, some reason for preferring another.

1813.
Hilary
Term.
Budd
v.
SILVER.

considerable question is likely to arise between the estate of the deceased and a son of Mr. Silver, respecting the validity of a gift. The parties interested in the property might entertain a great deal of jealousy that the claims of the estate might not be so strongly asserted by the father against his son; the more so, as he has produced affidavits to shew that in his opinion it was a valid gift.

The Court grants to the person who has the majority of interests, unless there be some ground for setting him aside:—here there is no ground.

Administration granted to Budd.

ARCHES COURT OF CANTERBURY.

REEVES v. REEVES.

1813.
Easter
Term,
May 3.

AN application was made to the Court on the behalf of the party proceeded against, to permit Mr. Gallatly, a witness who had been examined in this cause, to be re-examined;—on the ground that he was so unwell during the time he was under examination, that his memory had failed him, and, consequently, that his conscience now impelled him to wish to be re-examined.

The re-examination of a witness refused.

Lushington and Herbert in support of the application.

Cited Griells v. Gansell, 2 P. Wms. 646. Sandford v. Paul, 3 Brown's Chanc. Cas. p. 370. Ingram v. Mitchell, 3 Ves. Jun. 297. Sawyer v. Bowyer, 1 Brown's Chanc. Cases, 388.

Swabey and Adams contrà.

The cases have no bearing on the point;—this is not an application to state that he has been misconceived; but, an application for permission to add to his evidence—he does not apply to rectify a mis-statement, but to supply a course of new facts.

SIR JOHN NICHOLL

Asked the Examiner whether, at the time of the examination, he observed any incompetency in the witness from illness, or any other cause.

1813.
Easter
Term.

REEVES

v.

REEVES.

The Examiner replied in the negative;—and stated that all the material points were accurately put to him.

JUDGMENT.

Sir JOHN NICHOLL.

The Court will not lay down that in no possible case, and under no possible circumstances;—a witness may not be re-examined:—but, under any circumstances the Court would accede to such a proposition with extreme jealousy.

The party here is applying for the re-examination of her own witness;—he has been very fully examined—and concludes his deposition in the strongest terms. It is confirmed by the Examiner that he was fully and carefully examined;—that the deposition was read over to him on the night on which it was taken;—that he attended again on the following day,—and the deposition was again read over to him.

It would go to the destruction of all evidence whatever, if a precedent of this kind were established.

POOL v. POOL.

1813.
Easter
Term.
May 3.

ON the admission of a libel in a suit for the restitution of conjugal rights.

Lushington and Cresswell contra.

The libel does not plead that the parties were of the age of twenty-one at the time of their marriage;—it is necessary to plead all that is necessary for the suit—in this case the party might give an affirmative issue, and yet the marriage might not be good. In *Heffer v. Heffer* (a) the libel stated the parties were of lawful age:—this was objected to, and the Court recommended the insertion of twenty-one years of age.

Arnold and Burnaby in reply.

The libel avers that the marriage was lawfully solemnized in consequence of a licence duly obtained by one party;—the affidavit leading the licence is exhibited, which states the age; this is sufficient in an ordinary case. If the objection to be stated is, that the party was under age, the usual proof must be resorted to by the adverse party to establish that fact.

Per Curiam.

I should wish to have precedents looked into, to see if there be any settled course of proceeding; if there be none, I should be disposed to hold that the fact is sufficiently pleaded.

In a libel in a cause for the restitution of conjugal rights, it is not necessary to plead specifically that the parties were of 21 years of age; provided it is pleaded that the marriage was lawfully solemnized in consequence of a licence duly obtained.

(a) Consist. of London, May 17, 1811.

1813.
Easter
Term.

Pool
v.
Pool.

The object is to prove that the marriage was had; the licence was obtained on the affidavit of the party as to age,—this would be proof of the marriage; the presumption of law would be, that it was valid; it would lie on the other party to deny it. It is averred that they were lawfully married; and the licence duly obtained;—and the affidavit is exhibited by which it was obtained. Proof of these circumstances is all that is required in ordinary cases;—it is not requisite that the age should be proved more than by them; therefore, if an affirmative issue should be given, the marriage would be good.

I wish to have the precedents examined, and exhibited on both sides; if I find a course of proceeding established, I shall require the party to follow it;—otherwise, I shall hold the averment sufficient as it now stands.

June 11.

JUDGMENT.

Sir JOHN NICHOLL.

I have caused enquiry to be made; and I find the libels (a) are given in sometimes pleading age, and sometimes not.

I am still disposed to hold, that where it is

(a) In the search made, forty-six libels in cases of restitution of conjugal rights since 1770 were examined;—it appeared that in twelve of them only the age was specified;—in thirty-four, it was not pleaded, in thirteen of the thirty-four one of the parties was bachelor or spinster: these marriages were by licence after the operation of the marriage act.—*Heffer v. Heffer*, in which the objection is stated to have been taken, was a marriage by banns.

pleaded that the parties were lawfully married, and the affidavit is exhibited in which the age is averred, and the entry of the marriage, that the averments are sufficient; it lies on the adverse party to shew any thing he thinks may impeach it.

1813.
Easter
Term.

Pool
v.
Pool.

Libel admitted.

PREROGATIVE COURT OF CANTERBURY.

1813.
Easter
Term.
May 13.

READ v. PHILLIPS.

Testamentary
effect given
to an unexe-
cuted paper.

JUDGMENT.

Sir JOHN NICHOLL.

Robert Phillips died a widower, leaving four children, by three different wives;—the will propounded divides the property in certain proportions amongst them; it is all in the deceased's own hand-writing;—it was found after his death, in a place where he is proved to have deposited it, by a person to whom he had read it.

The only question is, whether he intended it for his will, or as a preparation for his will? The paper is complete as to disposition, but there is no executor; and it is neither subscribed nor executed; it becomes necessary therefore, to account for these circumstances. It is very fairly written;—great pains are taken in the composition of it, but there are no formal or concluding words at the end. His house-keeper says, he told her “that he had a will by him at his late wife's death, which he had burnt, and that he had written another, which he would one day shew her;—that every person should have

a will by them;—that he one day took from the leaves of a large book a paper, and said, ‘This is my will, or wish;’—she replied, that it was neither signed nor dated; upon which he answered, ‘that made no difference:’—he told her he had written it all himself;—that she said it ought to have been drawn up by an attorney; to which he replied, it was all in his own hand-writing, and as good as if drawn up by fifty attorneys.

Under these circumstances I am quite satisfied that he intended it to operate as his will:—the presumption of law, which is very slight, in this case against the paper, is repelled:—and, therefore, I pronounce for the validity of it.

1813.

*Easter
Term.*READ
v.

PHILLIPS.

ARCHES COURT OF CANTERBURY.

ADDAMS *v.* KNEEBONE.

1813.
Easter
Term.
May 20.

An Appeal from the Consistory Court of Exeter.

An allegation
rejected in
the Court
below, admit-
ted in the
Court of Ap-
peal.

JUDGMENT.

SIR JOHN NICHOLL.

This is a testamentary cause, in which several papers have been propounded;—the first allegation was little more than a common *condidit*;—five witnesses were examined upon it;—publication passed,—no allegation was given in in opposition to it, and the Court below pronounced against the will. An allegation is now offered in support of the will,—and there can be no doubt that if it had been offered in time in the Court below, it would have been relevant and admissible; it pleads affection to the party benefited,—testamentary declarations and capacity. The Court below, if applied to, might, in its discretion, have rescinded the conclusion of the cause for the purpose of admitting this allegation. The limitations which the Court of Appeal prescribes to itself do not apply to this case; certainly not to an appeal from a Country Court, on account of the irregularities which occur in the proceedings of the country courts.

If the Court at Exeter precluded the parties from supporting the *factum* of a will by an allegation, it would have done the greatest possible injustice:—suppose the parties entitled in distribution acquiesce for ten years in a will, the writer of the will dies, and then they oppose it; there would be manifest injustice, if the executor was not allowed to plead supplementary matter,—justice might be defeated by management.

However cautious the Court is, in general, against admitting an allegation after publication; yet, under the circumstances of this case, I am clearly of opinion that it ought to be admitted.

I shall expect all diligence in this case. (a)

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v.

KNEEBONE.

REEVES v. REEVES.

1813.
Trinity
Term.
June 11.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit for separation, by reason of adultery, brought by the husband against the wife;—the adultery is fully proved;—that proof not being resisted, it is unnecessary to detail it. The wife

Separation on
proof of the
adultery of
the wife, not
barred by the
conduct of
the husband.

(a) Many witnesses were examined on this allegation; and in Easter Term, (May 9,) 1813, the cause came on for hearing,—when the Court reversed the sentence of the Consistorial Court at Exeter, and pronounced for the validity of one of the papers propounded, but gave no costs.

1813.
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Term.
 {
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defends herself, not on the ground of her own innocence, but by bringing an accusation against her husband, not of mere connivance, but that he has been the active instrument of his own dishonour. —If proved, this is a sufficient defence; for he cannot come into a court of justice complaining of that as an injury, which he himself has caused to be done.

The history of the case, as given by the wife, is, that she, while living with her mother, was induced to marry Reeves clandestinely;—both were minors. In 1810, Reeves's father discovered the marriage, compelled his son to quit his wife, and go to America;—that the father afterwards, with the privity of the son, used means to seduce the wife to commit adultery, but that she returned to her mother, and lived in an irreproachable manner till this suit commenced.

This, if proved, would be a strong case of defence; for, though the privity of the son should not be proved, the Court would go far to presume it; if it should be shewn that the son has left the father his agent, with a proxy, enabling him to proceed against his wife in the event of her committing adultery.

It is pleaded, that the parties became accidentally acquainted, and in a short time were clandestinely married;—but, it appears by the evidence of the mother herself, that her daughter had, in the course of the preceding year, cohabited with this young man, and that it was not until five months after their first cohabitation that the banns were published, in a parish in which neither of them re-

sided :—under which publication the marriage was had ; and they then went to her brother's. Mention is made of a bond given by Mr. Henderson, of 80*l. per annum*, to Mrs. Reeves ; but this is wrapt up in mystery ;—therefore, as if there was something not creditable to the party to disclose, it has been suggested that the bond was from a person with whom she had a prior connexion ;—but that would not avail the husband : it is said that she resided with her husband some months before marriage,—but neither will this affect the case :—antenuptial conduct cannot lay the foundation of a suit for divorce by reason of adultery ; nor can it be brought forward as such against her ;—but antenuptial irregularities do repel the sort of defence set up here that she was maliciously deserted by her husband, and her virtue undermined by artifice and stratagem.

Reeves was the son of a colourman in the Strand ; he was an apprentice to his father, from whom, as has been stated, he kept his marriage secret :—the father was informed of the connexion by an anonymous letter ;—on taxing the son with it, he denied it ; but the next day he wrote a letter to his father, deploring, as unfit, the connexion he had formed, stating that he knew his wife had been guilty of adultery ; that he was unhappy, and was going to sea. He went shortly afterwards to Ireland, and was not heard of again till January, 1811 ; so that he was not compelled by his father to quit a virtuous wife ; but he left her under the impression that she had been guilty of adultery. Reeves returns from Ireland, and is reconciled to

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Term.

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his father ;—he is informed that his wife conducted herself during his absence as a common prostitute ;—he determines never more to live with her ; —and in June, 1811, he went to America, where he has continued ever since. These circumstances are deposed to by different witnesses :—no imputation can be raised from them of a malicious desertion ;—he quits his wife under the impression that she was an adulteress ;—the foundation of the defence laid in the plea wholly fails. The mother ventures to depose, as pleaded, to the virtuous conduct of her daughter ;—other evidence impresses me with a contrary belief, and also with the idea that the mother must have been aware of it ;—her brother and sister were both satisfied of her criminality ; and, as she expresses it, gave her up. It is proved that she used to dress herself, and go out in the evening ; and not return home till late the next morning. Full credit cannot be given to her mother, that she conducted herself with perfect propriety : the husband has left the country under the belief that his wife was an abandoned woman, but having no positive proof of her guilt ;—it is no imputation against him that he wished his friend to watch her conduct. He is charged with having used means to induce her to commit Adultery.—Dunbar states that application was made to Reeves's father for a maintenance. That Ann Thompson, to whom the application was made, said, " Adultery " must be committed,—she stands in her own light, " there must be a divorce, the sooner the better." But Thompson, and Reeves the father, deny any such conversation, or any such intention ;—Dun-

bar stands forth as her protector and paramour, he had criminal connexion with her ; he is represented as a person preparing himself for the Bar, and an officer in the London militia ;—his application to the father, (he not being her attorney) leads to the belief that a connexion between them had then commenced. I am of opinion that the plan to seduce her into adultery is by no means established ; and that the friends of Mr. Reeves were only watching her for the purpose of detecting her.—But one act of condonation is stated subsequently, namely, the sending her tickets for the play ; it is said this was only to prove her identity :—but he should have done nothing which would have led her into temptation ; and if she had been that night led into adultery, and that had been the only act of adultery proved, I will not say what the consequences might have been, or how far the Court would have decided on a single act :—the Court will countenance no active step which leads to a criminal act ;—here it led to no consequences, as the tickets were not accepted.

The father would have acted more judiciously, to have afforded her some support :—a husband is bound to support his wife, to alimant her during suit ; but here he was a minor, and an apprentice, wholly dependent on his father. The wife had friends, a mother, brother, and sister, with whom she lived.

The husband had no means of providing for her. The only question then is, whether the husband, not maliciously deserting his wife, but under the conviction of her adultery, leaving her

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Term.

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without provision, not having the means of supporting her, is barred of his remedy. I do not find that any of the cases cited go this length. The Court is to administer the law, not to make it:—if the husband connives at, or acquiesces in adultery,—the law is clear, he loses his remedy, *volenti non fit injuria* ;—still more so, if he actively promotes it. But, to say that a husband quitting his wife because he is convinced of her adultery, and only waiting for full proof before he institutes proceedings, and not supporting her because he had no means of doing so, is guilty of connivance, would be to state a principle void of authority.

The Court is reminded of the care of morality confided to it ; and to be careful of laying it down, that any woman left without support by her husband may resort to prostitution for the means of livelihood ; — I see not how the cause of morality will be supported by giving a woman encouragement in conduct of this description.—In this case I am not to strain principles. The woman, both before and after marriage, appears to have conducted herself with great profligacy. I have admitted her to go into her defence ;—but, after full consideration of the evidence, and the arguments by which her defence has been supported ; I am of opinion that I am warranted in pronouncing a sentence of separation.

CONSISTORY COURT OF LONDON.

BUCKERIDGE v. GOOCH, falsely calling herself
BUCKERIDGE.

1813.
Trinity
Term,
July 2.

A SUIT was instituted by the husband for a nullity of marriage by reason of the minority of his wife at the time of the celebration of the marriage. The woman's father appeared as her guardian, to conduct the suit. Her mother was examined ;—objection was taken to her evidence, as being the wife of the party in the cause. To this it was answered—that he was not a party suing in his own right—but merely a formal party to make a lawful appearance for his daughter.

In a cause of nullity of marriage promoted by the father of a minor, the evidence of the wife of that father is admissible.

Per Curiam.

The objection was over-ruled.

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Term.
 July 1, 8, 16.

WARING v. WARING.

Charges of
 cruelty
 brought by a
 wife against
 her husband,
 not substantiated.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a proceeding by Mrs. Waring against her husband for cruelty and adultery.—The parties were married on the 5th of October 1800, and have five children—she left her husband in Jan. 1811, and soon after applied to this Court, charging cruelty and adultery against her husband.—The charge of adultery has not been pursued; there is a letter indeed introduced annexed to an interrogatory unknown to the other party on which some observations have been made; but it is impossible for the Court to give attention to it, or to the observations made upon it, as no opportunity has been offered to the other party of contradicting it. I shall follow the example of the adverse party, and dismiss that part of the charge from my observation; there only remains, therefore, the case of cruelty.

The definition of legal cruelty, is that which may endanger the life or health of the party—it generally proceeds from the wife, as the weaker person—but it may come from the man, and has so done in several cases; but generally, the wife complains of what is dangerous to her—on the shewing of which the Court releases her from cohabitation.

In doing this the law presumes her not to have been the authoress of her sufferings; it is on

the presumption that her own conduct has been proper, if not, the remedy is in her own power; she has only to change her conduct; otherwise, the wife would have nothing to do, but to misconduct herself, provoke the ill treatment, and then complain.—I do not mean that the law would not interfere, if this misconduct was visited by the husband with intemperate violence; there may be failings, if inordinately resented and visited with a harsh and more than due authority, upon which the Court would not decline to interfere. But if her conduct be totally incompatible with the duty of a wife, if it be violent and outrageous, if it justly provoke the indignation of the husband and causes danger to his person—she must reform her own disposition and manners; she must remedy the evil by changing her own measures; and it is to be hoped that the evils will cease with the behaviour which produced them: and, if they do not, she may then complain to the Court, and solicit its interference with effect.

On these principles this cause is to be examined.—It most certainly appears, that in this family grievous dissensions have existed, unbecoming the situation of the parties in life, and the duty of their relationship to each other—gross abuse,—violent language—personal struggles—disturbance of the neighbourhood; in short, such scenes as the Court has seldom witnessed in its experience of these cases. It does not necessarily follow that these dissensions are the husband's fault—they may be the fault of both—or pre-eminently of the complaining party herself.

Before I proceed to examine the principal parts

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of the case, some observations occur with respect to the witnesses.—The greater number are produced by the complainant—they are servants, and, where husband and wife disagree servants are witnesses to be heard with caution—they have their prejudices—the females generally take the part of their mistress—some are dismissed by one, some by the other: they speak according to their supposed injuries. Three are cookmaids, who, from their situation, can know but little; they come in where the parties are in contention, but must be ignorant how the contention arose.—Two are housemaids: the same objection applies to them; they come in when open hostilities have broken out, but do not see the origin of them. The footman or butler is also produced, who, perhaps, had more access to them; but his account shews that his opportunities of observation were very imperfect.—A surgeon likewise, Mr. Cooper, has been examined, who appears to have had some differences with the husband, which may have coloured his evidence—but his knowledge, from his own observation, is of a very superficial nature.—In one particular illness he thought Mr. Waring's attention to his wife was not such as it ought to have been: this is matter of opinion—this may depend on the different degree of warmth of feeling in different men, and cannot be made a charge of legal cruelty.

Mr. *Utterson*, a gentleman at the bar, speaks to one fact, from which he infers harsh conduct, of which he can know little: she came in a state of distress; but he knows nothing of the commencement of the quarrel, and so judges only from her appearance; if the husband had come in in equal

disorder, he might have excited equal sympathy ;— frequent noises are heard : appeals are made by the lady from the windows, which shew great disorder in the house.—Twelve of the witnesses are subject to this objection, that they never saw the origin of the quarrels. Cooke and others saw the quarrels, but did not see the beginning of them— what appears offensive and harsh might be justified or palliated by its commencement ; that which would be violent, if aggressive, might be justified if defensive.—If the wife was the prior *lædens* ;—if she gave the first blow, though it may have been unmanly to return it, the law will allow for the infirmities of human nature, and make allowances for conduct provoked by gross and scandalous indignities.—The representations of such witnesses are entitled to little credit ; but I must observe that several of them throw the blame upon the party complainant.

Mr. *Henry Waring* is the witness whose evidence, I think, entitled to the greatest credit—he is the nephew of one of the parties ; but he has been examined on both sides, and speaks with moderate allowance for the faults of both parties. He saw them daily ; in their quarrels he says the conduct of the wife was provoking, and soon became violent.

Chapman, who was employed in waiting on the children, as a nursery maid, says, “ She frequently “ put herself in a violent passion ; often said provoking things to him, which, as it were, made “ him quarrel with her.”

Elizabeth Wickens “ considered her as very

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“provoking and sullen ; she frequently locked herself up. One day, when she did not choose to go down to dinner, she sent a message by one of her own children, to her husband, that if he did not send her up some dinner, she hoped the bones would stick in his throat, and choak him.”

Lucy Wickens says “she frequently dined in a different room from her husband—witness saw them frequently together ; that her conduct was frequently very provoking to her husband : several times she locked him up in his rooms, and refused to let him out, notwithstanding the messages he sent to her ; once he was obliged to get out at the window.”

Susan Wickens “thought her conduct very irritating, speaks to her locking up her husband, and that she would sometimes order no dinner to be prepared for him.”

These are her own witnesses, who depose to her conduct, which is highly reprehensible ; which must be expected to draw down severe treatment on her ; in which she would be the authoress of her own wrong, and not entitled to relief.

I will now dismiss some charges, of which there is no evidence—the giving her an emetic to procure a miscarriage ; of this there is no evidence whatever, but some declaration, made by herself to Mr. Cooper the surgeon, and the servants ; and seeing the nature of the declarations, in which she has indulged herself, respecting other acts, I do not think, in this instance, she is entitled to much credit.—I have looked into the husband’s answers,

he denies the charge upon oath—he may have offered her medicines, he says, but it was for no such purpose—her sister has not been examined on this article; which is singular, as she appears to have been much in her confidence.

Another charge alleged is, that she had no supplies of money while her husband was absent in Ireland: this is not only disproved, but the fact turns out to be directly the reverse; she was regularly furnished with money from his counting house.

Another accusation is, that she was compelled to come down stairs to dinner, when she had just had a miscarriage—that she came down to dinner, when she was very infirm, is true—nothing further is proved, but her own complaint; to which, considering the colour of her operations, I do not give credit.

Another charge is, that her husband for some years forbade her intercourse with her own family: it was not without hesitation that the Court admitted the pleading this fact; for, though it may be a harsh exercise of the husband's authority, yet he may be justified in such a prohibition: though a woman may be amiable, her connexions may not be so; and there may be many reasons to justify a husband in denying such an intercourse—though it may be harsh, it would be going too far for the Court to interfere. But it appears that some coolness took place between her husband and her father, on account of some pecuniary matters, in which the former thought, whether justly or not is immaterial, that he was ill-treated by the father—

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that he had provided articles for another person, on her father's recommendation, for which he thought him responsible, but he thought he was not. The husband complains that she threw the note from her father, respecting this transaction, into the fire—she admits, in her own plea, such facts as might fairly have given the husband ground for such a surmise.

The substantial charges of ill-treatment are three, they are admitted to be so by the counsel;—but, if they are not *proved*, in point of severity, so as to carry legal consequences with them, the suit is at an end; it is necessary, therefore, to examine these facts.

On the 6th of April, 1808, the libel pleads that Mr. Waring, without any provocation, put himself in a passion, swore, attempted to drag her, &c. and beat her head against a marble chimney piece; that he broke her comb, which he forced into her head—she fell; he dragged her; the servants interfered on hearing her screams, and the husband then desisted.—Several witnesses speak to this; but these servants come in after the heat of the battle, and know little or nothing of the circumstances that led to it; it turns out that Mr. and Mrs. Waring were invited to spend the afternoon with Mrs. Rule, and that there was some altercation about a coach. Mrs. Waring's sister does not mention the preliminary circumstances of the quarrel, in her examination in chief, but when pushed by interrogatories, she says, that the quarrel happened just as they were going out; that, in consequence of it he went alone, and she, unwell and agitated by the

altercation, staid at home. On the same interrogatories, she says they were both going out, but the husband went alone—the cause was, the wife sent her to ask him if he would have a coach—he answered in the negative—she sent again—he again answered in the negative—she, ten minutes after, sent a message, by one of the children to say, she *would have* one got; from the lateness of the hour and the uncertainty of getting it, she determined not to go;—he was angry, and went alone, leaving them to follow him—afterwards rain came on. I see no reason why the parties should be so violently dissatisfied with each other.—A message was sent from Mrs. Rule, to desire her to come, or say whether she was coming or not—the servant was called in;—Mrs. Waring informed Mrs. Rule and her party, by this servant, *that Mr. Waring himself could tell the reason why she did not come*; and, after delivering this reply, the messenger was sent back. I cannot but think it was a rude and improper message, tending to expose the husband to the ridicule or censure of the company with whom he was—she could have gone—and I think the message was sent evidently with a view to draw that consequence upon him. Take it any how, her conduct was irritating; and it is not surprising that it should bring him home a provoked husband. What passed at first appears only from the sister; and considering how much she had made herself a party, that she had not dissuaded the wife from the behaviour and message before, I think her account of what followed is imperfect, and not perfectly credible: she says that, *without*

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saying a word, Mr. Waring passed her, jerked his wife off her chair across the hearth, by which she fell and struck her head; she screamed, and the servants came in—*Wells* says he found her on the ground, crying, “Oh my head;” he said, “Yes, with a violent oath, and it’s *oh my head too* ;”—it appears then that they were both complaining of mutual violence;—he calls it a battle, another scuffle—it is extraordinary that the next day they dined together: and, *Wells* says, they appeared to be reconciled; if it happened as stated, I think she would probably have put herself for some time under the protection of friends; I think originally there was a provocation in not going, and a grosser one in sending the message;—a message passed after the conflict on his return, in which both complained—they dined amicably together the next day; and a formal reconciliation took place, through Mr. Abernethy, by the recommendation of her father.

Her husband went to Ireland—but Abernethy says he gave her a letter and told her her husband was coming home; she burst into a passion of tears, continued hysterical all day, *wished he might never return, but be drowned on his passage*.

Connect this with the message sent by one of the children, and I ask whether every thing outrageous is not to be expected from a person who so gave herself up to the expression of such an ungovernable passion.

Every thing ungracious appears to have passed on both sides. No open quarrel is brought forward till they were at Sandgate, in 1809. Henry Waring’s account (which, as I observed before, is

the most credible) of the mode of living then, is not favourable to her. The servants would tell him *as she had ordered no dinner for him none was prepared*;—at times she was violent and outrageous, particularly about the carriage.

Elizabeth Wickens speaks to the same effect.

Looking at this system of life, I think the wife could not more effectually try her husband's temper; contradicted in every thing, he appears to have borne it in a way rather inconsistent with that irritability of temper which is attributed to him—it makes evident what Henry Waring says; *she frequently told him, viz. that she would tease her husband into a separate maintenance, and would have 600*l.* per annum.* Mrs. English says, 800*l.*; they may have mentioned different sums, but I think the intention was to force a separate establishment by determined contradiction—such conduct could answer no other purpose.

Another fact complained of occurred on the 10th of October; Henry Waring says she asked him to go and see the fireworks:—the husband said he wanted him—she said if he would not let him go, he should not go himself—she locked the door, he opened it, she laughed insultingly, and he gave her a slap on the face; the witness thinks it did not hurt her, but it must have made her face smart—she attacked him, scratched him, pulled off his wig, took hold of the poker, and said *she would settle him*—it was not an *incruenta victoria*, but she carried off the wig, the *opima spolia*, which were pinned up in the window-curtains, and were not recaptured till the next day. It is scarcely possible

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to speak of such scenes with gravity, if they did not seriously affect the peace of a family. The lady seems to have taken the law into her own hands, and employed those hands most energetically on this occasion.

The husband, not unnaturally, returned to town in anger—a reconciliation between them was attempted by their friends—it might have been hoped that a sense of duty might have returned—something of that kind appears in a letter of hers which has been exhibited, acknowledging misconduct—he required that she should retract her dreadful expressions; what they were is not mentioned: however, she does retract them; and, thereby, admitted, undoubtedly, that such had been used—it has been answered that this was wrung from her, and it certainly appears not to have been a sincere and serious disavowal—her conduct was quite the reverse of what should have followed it, if sincere—her very penance was little short of renewed misconduct.

The last act was that of the 22d of January, 1811: this led to their final separation.

Henry Waring says, that the husband asked him to go to the theatre—she desired him to stay, and take her the next day—he said he would go then too—she said he was going to a mistress. She went out, and locked the area door and the house door. Suppose her suspicions were true, was this the proper way to regain her husband's affections? to turn his castle into a jail, and to become his jailer? it would probably lead to the opposite result—it would drive him to some

more indulgent society. The committing an act of false imprisonment is an extraordinary way of breaking up an illicit connexion, and recovering alienated affections. He demanded the key, she refused it—he desired her to observe that he did not mean to use unnecessary violence—he attempted to take the key, she screamed—he said he would not hurt her, but *he would have the key, which he had a good right to have*; a great struggle took place, the servants desired her to give up the key—she answered, *how can you plead for such a villain?*—Consider the effect of such an expression to a husband locked up, and demanding possession of his own house, and the use of his own liberty. The servants remonstrate: she threw a little trunk at him, aimed a blow at him with a candlestick, got him down on the chair, bit his nose; and said, If he would not go out, she would give up the key; he got it, but it was a conditional surrender.

It is not necessary to pursue this history, which has degraded the attention of the Court for three days.

After this the consequences, which it is quite impossible, as I think, not to expect, followed. The husband found means, somehow or other, to effect the dismissal of his wife—and I cannot say, if he was reduced to the alternative, either to be deprived of his own liberty and locked up in his own house, or to part from his wife, that he was blameable if he took the latter course. In the conflicts between two such dispositions, there is no saying what might ensue. I do not enter into

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the mode which he took—all that followed was nothing more than the natural sequel of what went before.

On this state of the evidence, I am not entitled to say that either party is free from fault: to enter into personal scuffles with a woman, and a wife, is a hard extremity; but a man may defend his own life and liberty, and it is a hard task always to return blows with mere words—he may defend himself by force, if attacked by force.

But though I may not be able to exonerate the husband from blame; the wife's own conduct does not give her a title to complain. I am unwilling to describe it in the terms which properly belong to it: it might look too much like that indignation, which every Court must naturally feel at having such scenes brought before it. I recommend to her the duty of self-examination: and to consider whether her own behaviour may not remove the evil, and consist better with her duty to her husband, her children, and herself. In the hope that this may be the case, I dismiss the complaint, and exonerate her husband from all further attendance in this Court.

ARCHES COURT OF CANTERBURY.

VERELST v. VERELST.

*(An appeal from the Consistory Court of London.)*1813.
Michaelmas
Term.
Nov. 25.

IN this case a suit for divorce, by reason of adultery, had been instituted by Mr. Verelst against his wife ; and a libel had been given in by him. Mrs. Verelst gave in two successive allegations responsive to the charges brought against her in the libel, and recriminating upon her husband. Witnesses were examined on both sides—and publication was decreed.

On the
admission of
an exceptive
allegation.

The present question arose upon the admission of an allegation excepting to the credit of four of Mr. Verelst's witnesses. A part of this plea had been rejected, and part of it admitted in the Court below.

From that sentence Mrs. Verelst appealed.

Swabey and *Jenner* argued in support of the sentence of the Court below.

Arnold and *Herbert*, for Mrs. *Verelst*.

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JUDGMENT

Sir JOHN NICHOLL.

This suit originated in the Consistory Court of London : a libel was given in by the husband, and eight witnesses were examined upon it—an allegation was brought in by the wife, on which she examined twelve witnesses ; and afterwards another allegation on which she examined four witnesses. Publication passed in the cause, and an exceptive allegation was then offered attacking the character of four of Mr. Verelst's witnesses. The Consistory Court rejected a considerable part of it, from which sentence the wife appeals ; and this Court is to decide whether the judge of the Consistory Court has done right in rejecting it.

Before I examine the contents of the allegation I will notice some of the principles laid down. It is admitted, on all hands, that exceptive allegations are received by the Court with great caution and jealousy : it is a principle of all Courts, whose proceedings are regulated by the civil law, that all facts shall be pleaded and proved before the depositions of the witnesses are seen, from the danger which might arise from the fabrication of evidence to meet the defects of the case. The Court is not the less cautious, when an allegation of this description is offered by the wife ; for though it is not the wish of the Court to narrow her defence, yet it must recollect that she has not the usual restraint of costs to operate as a check upon her conduct, as the expences on both sides are defrayed by the husband. It has been suggested that the particulars of this case may justify a re-

laxation of this principle; but the Court must be cautious not to endanger the principle itself.—It is said that the husband is charged with having obtained a verdict by collusion, and with tampering with the witnesses: but I have to remember that the wife has pleaded recrimination, and, in some articles, collusion, and that the husband had declared he knew of her adultery; therefore, though not inconsistent with innocence, yet the tendency of the charge was such as made the Court vigilant as to the subsequent defence, by charging the witnesses.

In the second allegation there was no attack on the general character of the witnesses; but it is pleaded that the verdict was obtained by the defendant having been persuaded not to bring forward her witnesses, and that the damages were agreed upon.—If such is really the complexion of the cause, the husband would do well to consider what advantage would result to him from proceeding in this suit.—It is competent to the wife to offer such a defence, and to shew that the husband has brought unfounded charges; but this is not a case in which the Court can relax the principle on which it usually proceeds.

An exceptive allegation must not merely shew slight variations in the testimony of witnesses; but it must shew that the witnesses have wilfully sworn falsely; it must overturn their credit.

The *first* article has been ordered to be reformed, I suppose, by striking out the names of the witnesses against whom no article has been admitted.

The *second* article recites various parts of the

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depositions of the witness, William Preston, both in chief and on interrogatories—he had deposed to two acts of indecent familiarity. He was a gardener, employed in the absence of the footman; and sometimes, when the footman was not absent, to wait at table. The acts of indecent familiarity he states to have occurred at different periods: one on a day soon after breakfast; another on a Sunday, about five weeks afterwards, when there was company in the house.—In contradiction to this it is pleaded that the one footman left the family on the 24th of October: and a new one succeeded him on the 6th of December, and that there was no company in the house; and that Mr. Staples, with whom the wife is charged to have committed adultery, was only once there in that period.—The witness, however, whose credit is impeached, is not, in his deposition, precise as to time; he was several times employed as footman, and might easily mistake the time when he saw the facts; it might possibly be when he was assisting the footman—he may have confounded the times—if these facts, therefore, should be proved, they will not satisfy the conscience of the Court, that the witness has deposed knowingly and wilfully falsely—if he had been precise, and tied himself down to time, and it could be proved on the other hand, that Mr. Staples was only once there: his own evidence would weigh a little against the witness—but if he could prove an alibi, it ought to be distinctly set forth—I think the judge of the Consistory did right in rejecting this article.

The *third* article pleads that the witnesses gave

a different account on the trial at common law from that to which they have now deposed.—I do not see from the statement that it amounts to a contradiction ; it is only that they express the same fact in different terms.

The *fourth* article pleads a direct and positive contradiction of Preston ; and, as the party will have the benefit of this article which is admitted, it makes it still less necessary to have admitted the second and third—Let this article be reformed.

The *fifth* article is an attack on the witness, Humber, who has deposed, that “while they were at an hotel at Harrowgate, by means of the lamps in the passage, and a light from the window on the stairs, she plainly saw Mrs. Verelst go to Major Staples’s bed-room door in her dressing gown.” In answer to this they undertake to prove there was no lamp or light on the stairs—but really, considering the distance of time at which this transaction happened, I think it would not be possible to produce evidence so precise as to satisfy the Court that there was no light by which the witness could see the transaction she relates. I reject this article.

The *sixth* article has been admitted against Humber and in that the party has the benefit of a stringent contradiction.

The *seventh* article states that Humber at different times, has given different reasons for not communicating to her master what she had seen. I think, however, the reasons stated might very well concur, and I confirm the rejection of this article.

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The *eighth* article states, that Humber says, she watched the transaction from the best bed-chamber; and, it is pleaded, in contradiction, that she could not get into the best bed-room from her own bed-room, without going through the kitchen; and that a person slept in the kitchen, which person will dispose that, after she went to her bed-room, she did not return to the kitchen.—The objection to the admission of this contradiction is, that these circumstances might have been pleaded in contradiction to the libel; and that by admitting it, in this stage of the cause, I should break in upon a rule, than which none is more cautiously observed in this Court, *viz.* that a party shall not lie by and contradict in exception that which he might have contradicted before publication in plea.—Without this rule the purity of evidence could not be preserved; and, on this ground, I reject the article.

The *ninth* article is admitted.

The objection to the *tenth* and *eleventh* articles is, that if the circumstances should be proved, they would not amount to a sufficient contradiction. I think the variations stated would not discredit the witness—he does not pretend to have taken down what was said, but the substance of what was said. She might easily mistake the 20th for the 21st of October—he states himself that if it was so in the paper, it was there by error, and the Court would put that construction upon it; it would not consider it as a wilful and corrupt misrepresentation.—I see no inducement to falsify it.

The same observations apply to the *thirteenth* article.

I have now disposed of all the articles but the *twelfth*; which is given in contradiction to the evidence of Dorothy Sayer. She deposes, on her examination on the tenth article of the libel, "that the clock had just struck twelve, when, by means of the light which came through the glazed fan-light over Major Staples's bed-room door, she plainly saw Mrs. Verelst come out of her own bed-room." Whereas, on her examination in the Court of King's Bench, on being asked, "*Did you leave the best bed-room door open so as to see,*" she answered, "*Yes.*" And, on being afterwards asked, "*How long had you been there before you saw any thing?*" she answered, "*the clock struck one, and, about five minutes afterwards, she stepped out of her own room, on the landing place.*"—The witness gives no particular reason why she should fix one hour more than another—there is something of a variation certainly in this account, but it is not a material variation; if any reason had been assigned for it, the Court might have attributed corrupt motives to her; but, as it is, I must impute it to have arisen from mistake, from want of recollection, or from that confusion natural to a female on being examined in a public court of justice.

The evidence on which the Court is to rely, for the decision of the cause, is more to be collected from the substance of the depositions, than from any thing usually brought forward in an exceptive allegation. Circumstances material to the elucidation of the cause seldom come out on a plea of this description.

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SMITH v. SMITH.

1813.
Michaelmas
Term.
Dec. 7.

*By Letters of Request from the Consistory Court
of Bangor.*

Alimony
pending suit.

JUDGMENT.

SIR JOHN NICHOLL.

This suit is brought by the wife for cruelty and adultery.—She now applies for alimony pending the suit; and certainly the Court will not allow the same as if such a charge was established; yet, I think, the nature of the suit is to be considered; the charge is made—the answers are given in;—as yet there is no allegation on the part of the husband;—there is no ground to consider the suit as vexatious—no proceedings appear to have been had for the purpose of unnecessary delay. Therefore, the wife has a right to be maintained with some reference to her former comfortable state, yet with moderation.

Under the circumstances it is to be considered that a very great part, though certainly not the whole, of the fortune belonged to the wife—there is one child;—in the proceedings it appears that the wife is desirous to have that child; but the husband, charged with adultery, will retain it.—

The Court is not inclined to lessen the alimony on account of the maintenance of this child.

The Court must consider what is the fair and reasonable proportion.—I do not exactly ascertain the income of either party from their answers.—I take the husband's income to be about 1500*l. per annum*, and that which the wife has as a separate allowance to be about 300*l. per annum*.—I think 200*l.*, in addition to the 300*l.* the wife already receives, will not be an improper allowance.—I give it clear of the property tax, because that is deducted in the husband's estimate.

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Term.

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v.
SMITH.

WALKER v. WALKER.

Michaelmas
Term.
Dec. 7.

*By Letters of Request from the Consistory Court
of Worcester.*

A LIBEL was offered to the Court by the wife, charging her husband with various acts of cruelty and adultery, and praying a separation *à mensd et toro*.

A matrimonial
suit dismissed
on account
of delay
in the pro-
ceedings.

Jenner, for the husband,

Was proceeding to state his objections in detail

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to the admission of the libel, when he was stopped by the *Court*, who called upon the adverse party to account for the delay which had taken place in the proceedings of the suit.

Lushington, for the wife,

Stated that Mrs. Walker had been confined by her husband, and denied access to her advisers, and that she was a person very weak in mind.

Per Curiam.

The whole complexion of the case is that of complete condonation and acquiescence—the suit was commenced and then as it were abandoned, for a delay of nine months takes place; unless this is satisfactorily explained, I shall dismiss the cause.—An instrument was signed by the wife; it appears to have directed an end to be put to the cause, this instrument is stated to have been obtained by duress; but that duress, by their own statement, must have ceased in February last.

If I suffer it to stand over till the first day of next term, I shall expect such an affidavit as will satisfy me.—If she is a poor weak woman, without friends, I shall be loth to prelude her from bringing forward her case; but for some circumstances of this kind, which appear upon the face of the proceedings, I should have dismissed the suit.—She seems to have allowed herself to be superseded in the management of her family for a number of years, and to have acquiesced in it—then an arrangement is made, and she is the person to break that arrangement.

There is a presumption of acquiescence, but I

will allow it to be repelled before the first day of next term.

Let the cause stand over.

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SIR JOHN NICHOLL.

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I find a case, in which the Court has dismissed a suit on the ground of delay, in the parties proceeding. In *Betcher v. Betcher*, (a) a suit brought by a wife against her husband for adultery, a petition was presented to the Court, stating that the depositions were lost, and praying that the cause might be heard, on official copies of them. The objection taken was, that there had been such a delay as amounted to a condonation—the suit had commenced in 1775, proceeded till 1777, and from that time nothing had been done till 1787. The Court said it looked with jealousy into matrimonial cases ; particularly, when they were brought by the wife—and dismissed the suit on the ground of delay in the proceedings.

In the present case, the suit has not been so long pending ; but there are other circumstances which lay a stronger presumption of condonation.—It began in *Michaelmas Term*, 1812, by letters of request—and a proxy was exhibited by the wife's proctor, and no further proceeding took

(a) Consistory Court of London, *Michaelmas Term*, 1787, before Dr. Calvert.

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place till Michaelmas Term, 1813. This is such a delay as might have induced the Court *ex mero motu* to dismiss the suit—but when the libel is given in, I might have expected it to be perfect in form ; none, however, of the dates are filled up—they are all in blanks.—Again the Court would have expected a strong case—but here is long acquiescence and condonation.—Condonation will not so soon bar a wife as a husband—but the misconduct charged is for thirty years, during which the husband has been living in open adultery ; and, at last, it is not the wife who leaves him, but he who leaves her—this looks as if she had not considered the adultery such a grievance as she now wishes to represent it.

The 16th article states, that since the institution of the suit, *viz.* in February, 1813, she was compelled by her husband to execute a deed of separation on an allowance of 50*l.* *per annum* ; and then she gave an order to her solicitor to stop proceedings here : but it does not state that she has taken any steps to avoid the deed, or to punish the parties for a conspiracy—the story is improbable—she is stated to have been confined ten days in the city of Worcester. The going two or three times to a solicitor's office does not apply to this—but she does not proceed in the cause when the duress ends, but waits till Michaelmas Term.

It would be satisfactory to the Court to hear that an arrangement was going for securing this woman's subsistence ; but I must look to her conduct in the proceedings in a judicial view.

If the husband continues to live in adultery, I do not know but that the wife may have a remedy by a fresh suit—the condonation would be taken off.—I shall dismiss the parties from this suit.

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Term.

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v.
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CONSISTORY COURT OF LONDON.

1814.
Hilary
Term,
Jan. 25.

PARNELL, acting his Committee, *v.* PARNELL.

The committee of a lunatic may institute proceedings against the wife of a lunatic for adultery.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a suit brought against the wife of a lunatic, for adultery, by his committee. The facts of adultery are charged in a number of articles—the admission of the libel is contested on the ground that the party proceeding is incompetent to bring the suit; and I must acknowledge that there has not occurred, to my observation and experience, any case in which a lunatic has appeared in such a case by his committee—it cannot, therefore, be determined by precedent, but must be decided by principle and by analogy.

On principle it resolves itself into two questions; *first*, Whether a lunatic is put out of the protection of the law of England in such a case; *secondly*, Whether there is any other mode of proceeding by which he can obtain redress.

On the first point there can be no doubt it would be a most monstrous proposition that the wife of every lunatic was absolved from all the obligations of marriage, was at full liberty to commit adultery, and to fill her husband's house with a

spurious issue—the unfortunate husband cannot be left in such a state of aggravated misfortune.—It is impossible that any system of law can have been so improvident as to have left such a class of persons without any remedy; their claim to protection is stronger even than that of other men: the law must apply that vigilance for them of which they themselves are incapable—it must afford them relief against the greatest of all injuries, affecting every consideration dearest to the hearts of men; for the sake of their families, also, lunatics must be protected by some mode or other.

The question then is, in what way relief is to be afforded them. I should answer in the same way that it is, when their other rights are disturbed, namely, by means of the committee—who, being specially appointed the guardian of the lunatic, represents to the Lord Chancellor—he has the care, in the language of the petition, of the person and property of the lunatic and of his family—he is to take care, not only of his personal rights, but of the general interests of his family.—The lunatic must act by his guardian, by that person to whom the care of his fortune and property is confided.

The lunatic cannot directly institute a suit here; in momentous concerns connected with the Court of Chancery the committee usually applies to the Lord Chancellor for directions—to him the accounts of lunatics are submitted; but it is not necessary to resort to the Lord Chancellor for the purpose of exercising an authority to institute proceedings here. This Court, however, stands in no such re-

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lation to the lunatic ; but it is bound to entertain a suit when the committee has determined to bring it—it has no discretion to refuse it.

On these grounds, and upon principle, the power of the committee must be upheld : it is exercised to protect the lunatic from the greatest possible injury—from the alienation of his family property—from making him responsible for the support of a wife, entitled to no maintenance.

Upon analogy to other cases, in what way do persons bring suits when labouring under infirmity of understanding, and imbecillity from the immature period of their life ? The suit then is the act of their guardian ; he is to the minor what the committee is to the lunatic—he is appointed to have the *persona standi*.

In suits for nullity, the power of the committee has been admitted—and he has proceeded to the dissolution of marriage an account of the alleged incapacity of the party. Why not in this suit, which is not so momentous in its consequences ? No injury is done the woman ; if the lunatic recovers possession of his senses, he has the power of condonation if he should think her still an object of compassion.

On these grounds I am without any doubt that this libel ought to be admitted.

ARCHES COURT OF CANTERBURY.

1814.
Hilary
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Jan. 27.

BEST v. LADY EMILY BEST.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit brought by Thomas Best, Esqr. against Lady Emily Best, for separation by reason of adultery.—The marriage took place in September, 1804; they cohabited together till 1807, when Mr. Best was confined within the rules of the King's Bench prison.—Lady Emily at first continued to reside in her own house, but afterwards went to her father's (the Earl of Alboroughs) in Ireland—in 1808, she returned and cohabited with her husband in Temple Place, within the rules of the King's Bench—it appears there is, at least, one child, the issue of this marriage.

Delay in instituting proceedings in a matrimonial cause to be accounted for.

In July, 1808, she quitted her husband, and went to live with Mr. Henry—she cohabited with him at the Pack Horse, at Turnham Green; and afterwards went and resided with him at his seat, in Ireland—she lived with him till he died, which was in February, 1810.—During this cohabitation a child was born, which was baptized as the child of Mr. Henry and Lady Emily Best.

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In 1808 Mr. Best brought his action against Mr. Henry, for damages, in the Court of King's Bench,—in 1809 2,000*l.* damages were awarded to him—judgment went by default.

The present suit was instituted in 1813.

Of the proof of adultery there is no doubt—her cohabitation with Mr. Henry is completely proved—but the Court requires something more—the parties lived in open adultery for a year and a half, and it was not till five years afterwards that this suit was commenced—without deciding how far this delay in bringing the suit may amount to a condonation, at all events the delay requires explanation.—Why is the husband better able to bring this suit in 1813, than in 1808? This excites the suspicion and presumption of former connivance, which must be removed. The Court would expect to be informed how the adulterer became acquainted with the husband? And whether the intercourse was carried on with clandestinity? All now stated is consistent with the husband's privity, though it is very possible that no privity existed.—Mr. Henry visits Mr. Best at Temple Place—Lady Emily kissed her child at parting, and told her maid she should return the next day—which she did not—she wrote to the maid the next day to take care of the child—Mr. Best had already procured a nurse for it; and her maid went and found her the next day, and continued to live with her and Mr. Henry.

The question is, whether this was a voluntary transfer of his wife? The Court would like to be informed whether he felt any distress at his wife's

not returning; whether he gave her licence to go; but there is no one fact to shew what his conduct was on the occasion.

It is true an action was brought in 1809—but then judgment went by default. A verdict was given for 2000*l.*: this negatives a part of the excuse that the husband was unable to sue for a divorce on account of poverty.—Either the damages were recovered, or not; if they were not, the circumstance leads to the suspicion of collusion—if they were recovered, they must have supplied a fund for the prosecution of this suit.

There was every motive to accelerate the proceedings here;—a child was born, within eight or nine months after her cohabitation with Mr. Henry. There was every danger of a spurious issue; the husband was conscious of the situation of his wife—the fact was not disguised—the child was openly registered—in fine, there is that degree of acquiescence which requires explanation.

It is pleaded, as usual, that the husband has not cohabited with his wife since the discovery of the adultery—the Court is not strict in requiring proof of this article—it generally is unnecessary from the *res gesta*—the indignation of the husband, or the rapidity with which the suit has proceeded, generally repels all probability of connivance—but, in the present case, five years have elapsed without any proceedings.

These are difficulties which I certainly feel it necessary to have removed before I grant the prayer of the husband.

The party may either pray to have the conclu-

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sion of the cause rescinded, and then offer an affidavit to shew how he received the intelligence of his wife's departure, the embarrassment of his circumstances, and the reason of the delay. For where there is such full proof of the adultery, I am unwilling to drive a person, already in distress, to resort to the superior Court. Or, if the husband is dissatisfied, and thinks he is now entitled to a decree, I am willing to pronounce my final opinion immediately—and he may carry the case by appeal to the superior Court.

The Court would not have granted this indulgence to the husband, but that the adultery is fully proved, and that the embarrassment of the husband is clear.

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Jenner and Lushington tendered an affidavit on the part of Mr. Best.

Phillimore and Dodson *contra*.

It is impossible for the Court to admit any affidavit, or, indeed, any statement whatever, from the husband.

In all matrimonial causes the judge is bound to decide according to the proofs before him, *secundum allegata et probata*; (a)—if the case is not proved the cause must be dismissed; but, above all, it has been universally held, as essential to the pure administration of justice, that in all questions, involving either the dissolution of marriage, or se-

(a) *Actore non probante solvenda est res.* Gail. Obs. p. 93.

paration *à mensû et toro*, no credit whatever should be given to any statement, upon oath, either of the wife, or of the husband. In the present instance the Court is called upon to rescind the conclusion of the cause, not to introduce new matter alleged to have come to the knowledge of the party, subsequent to the publication of the evidence; but to admit the oath of a party principal, to purge away a grave judicial suspicion, growing out of the evidence which he has himself introduced. This is contrary to the practice of all matrimonial courts—a practice, having a deeper foundation than mere technical regulation and convenience, inasmuch as it is interwoven with the very essence and foundation of justice. All writers on the canon law enforce and uphold the necessity of it. (b), (c). Gails. observ. lib. 2. *Maranta Spec. Aur.* par. 6. 1. 7.

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Nor is this practice confined to the Rota, or to the Imperial Chamber. Ayliffe, in his *Parergon*, p. 365, lays down the same doctrine. The 105th canon is to the same effect. It is indeed essential that the old practice should be adhered to as

(b) Quapropter sicut in criminalibus ita quoque in hujusmodi civilibus arduis causis, probationes luce meridianâ clariores requiruntur, et hoc omnium maximè procedit in matrimonialibus si ad dissolvendum matrimonium agatur.—Et quemadmodum in criminalibus regulariter non defertur juramentum in defectum probationis; ita quoque in causâ matrimoniali juramentum locum non habet. Itaque probationes debent esse plenæ et perspicuæ per confessiones, et testes omni exceptione majores. Obs. lib. ii. p. 94.

(c) In causâ arduâ vel criminali non defertur (videlicet, juramentum suppletorium) *Marant. Spec. Aur.* par. 6. 1. 7.

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affording the only safeguard against collusion and perjury, which experience has been able to suggest.

The particular circumstances of this case are not such as to justify the departure from so unbending a rule. We deny that the facts stated in the affidavit can be introduced after the evidence has been made public; but if they are to be introduced, it should be with all the formality of plea and proof—thus affording to us an opportunity of trying their validity by the test of cross-examination.—But, the husband not having proved his case to the satisfaction of the Court, we submit that the only course to be pursued is, to dismiss the parties.

(d) A matrimonial cause, in the canon law, is deemed a cause of an arduous and important nature, and hence it is that, in such a cause, an oath is not given in supply of proof, according

(d) No sentence of divorce to be given upon the sole confession of the parties. Forasmuch as matrimonial causes have been always reckoned and reputed among the weightiest; and, therefore, require the greatest caution, when they come to be handled and debated in judgment, especially in causes wherein matrimony, having been in the church duly solemnized, is required, upon any suggestion or pretext whatsoever, to be dissolved or annulled: we do straitly charge and enjoin, That in all proceedings to divorce, and nullities of matrimony, good circumspection and advice be used; and that the truth may (as far as is possible) be sifted out by the depositions of witnesses, and other lawful proofs and evictions; and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath, either within or without the Court. Canon 105.

The concluding words of the canon of 1597, are *Nec partium confessioni, quæ in his causis sæpe fallax est, temerè confidatur.*

to the common and received doctrine of all the commentators, and the gloss of the canon law.

Jenner and Lushington, in reply.

The arguments do not apply ; as the authorities cited go to cases of dissolution of marriage. Here we only wish to introduce the *juramentum suppletorium* in aid of that which is imperfectly proved—not to substantiate adultery—that is established beyond all doubt, but to clear up another point on which the Court is not quite satisfied. The Court is not restricted as to the mode by which it shall enquire and satisfy itself as to any suspicion it may entertain of connivance or collusion.

No hardship is inflicted on the wife by this mode of proceeding ; she might have pleaded any facts in bar of divorce : the husband would then have had an opportunity of putting in his answers ; but she offers no defence.

In the present case we do not, by affidavit, attempt to prove the criminality of the wife, or to oppose any defence set up by her ; but to explain the conduct of the husband, on a point respecting which the Court has expressed some doubt.

Per Curiam.

A preliminary question is raised, whether the satisfaction required can be given by the affidavit of the husband.

In the principal cause I was fully of opinion that there was entire proof of the criminality of the wife—but I thought that the delay in bringing the suit required some explanation. The wife set up no case ; she did not suggest connivance, nor subsequent condonation. The Court itself took the

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objection, thinking itself bound, in point of justice, to give the husband an opportunity of explaining his conduct. The Court rescinded the conclusion of the cause not to allow the husband to supply proof of the criminality of the wife, or to answer any defence set up by her—but merely to explain the delay, and the Court thought the explanation (being merely confined to that point) might be made by affidavit—the wife had made no reply—she had no right to require a more formal mode of enquiry; for there was no objection, taken on her part, to the conduct of the husband. The Court called for explanation to satisfy itself and its own difficulties,—to protect itself, or rather to protect society from the collusion of both parties. If there is any connivance, the explanation would operate as much against one party as the other. In this view it does not appear to me that the Court is precluded from admitting the explanation in the form of an affidavit.

In this view also, it does not appear that the authorities cited apply to the question. It is true that, in matrimonial causes, there must be proof of the fact by witnesses. The *præsertim* of the 105th canon (e) seems to apply to cases of nullity—but, in the enacting part, it applies to divorce as well as nullity.

In this cause, is the Court, by admitting the affidavit, violating the injunctions of the canon? It has observed due caution; and, in consequence of that caution, the affidavit is required—it gives

(e) See page 166.

no credit to the confession of the parties—this affidavit is merely explanatory—if a plea had been given in by the wife, and the husband had put in answers to it, upon oath, the Court would have been at liberty to have looked into those answers.

After paying every attention to the arguments advanced, I am of opinion that I am not violating any principles of law, or any rules of practice, in admitting this affidavit—it is not admitted as suppletory proof, but merely to explain whether the husband has come into Court with clean hands.

All the necessary circumstances being proved against the wife, the affidavit is called for to remove the scruples of the Court. I shall allow it to be read.

1814.
*Hilary
Term.*

*Best
v.
Best.*

The affidavit of Mr. Best was then read: it stated in substance,

“That in 1807 he had become embarrassed in his circumstances, and under the necessity of surrendering himself to the King’s Bench Prison, and his wife went to reside with her father and mother the Earl and Countess of Alborough, in Ireland; that, in March, 1808, he obtained the rules of the King’s Bench Prison; and the best habitation he could get within them, situated at Temple Place; and his wife then came to reside with him, and continued to do so till she eloped with Joseph Henry, as described in the libel: That prior to his marriage, when he was paying his addresses to Lady Emily, he had frequently met the said Joseph

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Hilary
Term.

BEST
v.
BEST.

Henry at her father's, and had always studiously avoided him; and that when he called on him, after his marriage, at his residence in Stratford Place, he had not returned his visit.

That after Lady Emily took up her residence in Temple Place, he was one day told, by his servant, to his great surprise, that Mr. Henry had called upon him—that he called again about a week afterwards, and the deponent found him in the drawing room waiting his return; and he expressly swears that he had no other intercourse whatever with the said Joseph Henry than he has stated, and that he had not the least suspicion of any improper intercourse subsisting between him and his wife.

That when Lady Emily eloped from his house, she was suckling a child, and he was obliged to engage the wife of one of his servants to take charge of, and to suckle, the infant which she left behind her. That he employed Mr. Stokes as his attorney, who, by his direction, brought an action against Joseph Henry, in the Court of King's Bench, for criminal conversation with the deponent's wife; and Joseph Henry having suffered judgment to go by default, the sheriff's jury awarded 2,000*l.* damages. Judgment was signed in Hilary Term, 1809, and Joseph Henry paid the damages to Mr. Stokes, in April, 1809: but Mr. Stokes retained the same on account of his demands against the deponent; that he then instructed Mr. Stokes to take the necessary steps to procure a divorce; but he was advised that he could not then proceed against his wife, on account of her absence in Ireland. But on her return to England, in March, 1810, he

again urged his attorney to proceed against her ; that he said it would be attended with considerable expence, that he had no funds in hand to meet it ; that he had applied the 2,000*l.*, recovered as damages, in payment of his own demands and for other debts ; and that there was still a considerable balance due to him—that the deponent was then wholly in the power of Mr. Stokes, to whom he had conveyed his estates, in trust for the benefit of his creditors ; and that he was unable to proceed against his wife for want of money to carry on the suit—that a suit in Chancery was instituted by his creditors against the deponent, Mr. Stokes, and Messrs. Barrow, Lousado, and Co. to whom the produce of the deponent's estates in the West Indies had been consigned, and thereby his whole affairs were thrown into confusion, and he could barely obtain an allowance sufficient for his subsistence—that he frequently entreated Messrs. Barrow, Lousado, and Co., to advance him a sufficient sum to enable him to proceed in obtaining a divorce. That in 1812 he determined to employ another attorney, and dismissed Mr. Stokes ; that in April, 1812, an order was obtained to dismiss the Chancery suit ; that his creditors were then paid their demands by Messrs. Barrow and Lousado. That one of the first instructions he gave his new solicitor was to proceed in obtaining a divorce ; that in the spring of 1813 his merchants promised to supply him with sufficient money for that purpose ; and that subsequently he has not lost any time in instituting and conducting proceedings in this Court."

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Hilary
Term.

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v.
BEST.

1814.

*Hilary**Term.*

BEST.

v.

BEST.

Feb. 24.

Affidavit of
the husband
admitted to
satisfy the
Court as to
the reason of
his delay in
instituting
proceedings.

JUDGMENT.

SIR JOHN NICHOLL.

The affidavit appears to go satisfactorily to all the points :—previous knowledge is negatived,— the means the husband used to obtain redress, and the causes which prevented him, are set forth,—and, lastly, there has been no condonation.

In any other than a matrimonial cause the Court would not have required such an explanation—if the defendant had not set up such matter in defence, the Court would have presumed that no such ground of defence existed.

In the present case the Court has received explanation in the solemn and full affidavit of the party ; and feels itself bound to pronounce that Mr. Best has proved his libel, and is entitled to a sentence of separation from his wife.



PREROGATIVE COURT OF CANTERBURY.

1814.
Hilary
*Term.**Jan. 29.*

DICKENSON v. DICKENSON.

WILLIAM DICKENSON, of Brooklesby, in Lincolnshire, Steward to Lord Yarborough, died on the 19th of July, 1813, possessed of considerable personal property—a will, dated January 8, 1795, was found in a book case in the steward's office, at Lord Yarborough's, together with other private papers and securities belonging to him—the will was regularly executed and attested by three witnesses; but several alterations and erasures had been made in it, by the deceased, in pencil—and there was on the enclosure the following indorsement, written also in pencil by the deceased.

Alterations
in pencil on a
regularly exe-
cuted and at-
tested will,
admitted to
probate.

To my wife one hundred and sixty pounds per annum, so long as she remains a widow; in case she marries again, this annuity ceases; and the money in the fund in my name, she to receive for her own use and benefit. The furniture, as mentioned within. The books to be given to R. Jovitt, of Leeds, Woolstapler, as desired by J. D. deceased.

The question before the Court was as to the testamentary effect of the alterations in pencil—

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Hilary
Term.

DICKENSON
v.
DICKENSON.

they were propounded by the widow, and opposed by the brother who was one of the executors in the will.

At the period when the will was originally executed, the deceased had two sons living whom he had constituted his residuary legatees. The one had died on the 13th of September, 1804; the other on the 16th of August, 1811. It was pleaded, that by the initials "J. D." on the indorsement the deceased intended to designate Joseph Dickenson, the last of his sons who died.

Swabey, Jenner, and Gostling, in opposition to the allegation.

The question is *quo animo* this paper was altered—the circumstances pleaded are not sufficient to sustain an imperfect writing—the death of the two sons, the handwriting of the deceased, and the custody of the paper, are all the facts relied upon—the time when the alterations were made is not clear—it might have been at any period subsequent to the death of the first son, in 1804. There is no recognition—no sudden death—the material with which it is written is not unimportant, as was held in *Rymes v. Clarkson* (a)—in fine, the memoranda are such as a man writes when he has it in deliberation to do a future act.

The envelope carries the case no further; it is merely deliberative, and shews an intention to do more.

Adams and Lushington, contra.

There can be no doubt that the deceased's in-

(a) Vol. I. p. 22.

tention was to increase his wife's annuity, and to substitute another executor ; there is no great improbability that he should do it in this form—on the face of another paper coming from him, he is proved to have been an ignorant man—he might suppose (as is commonly supposed) that any writing would dispose of personal property.

1814.
Hilary
Term.

DICKENSON
v.
DICKENSON.

JUDGMENT.

SIR JOHN NICHOLL.

The deceased made his will in January, 1795 ; it was regularly executed and attested by three witnesses—and he left his two sons his residuary legatees.

The sons died before the testator—one in 1804—the other in 1811—the will was found in the repositories of the deceased—in an envelope endorsed “ William Dickenson's will ”—there are alterations in pencil in the body of the will—these alterations are all pleaded to be in the handwriting of the deceased—the exact time when they were made is not pleaded—but there is a strong probability that it was after the death of both the sons.

The question is whether probate is to be given of this paper as it was originally executed—or with the alterations :—the alteration being in pencil, increases the difficulty—it has been argued that, from this circumstance, they must be considered as merely deliberative ; but there is no doubt that, in point of law, they must be considered as equally valid as if made in ink, provided the deceased intended them to take effect.

Primâ facie it may be supposed, under the circumstances, that the alteration was intended—

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Hilary
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and, as such, the paper at least ought to go to proof. I say *prima facie*, because other extrinsic circumstances may hereafter be offered which may shew that they were merely deliberative.

The alterations are made with considerable care—the sum is carried out into the opposite side—the difficulty is, that the annuity, twice in the will, remains uncorrected—but it is observable that it is no where left uncorrected in the dispositive part, but merely in the recital.

The alteration also is highly probable—after the death of his children it was natural that he should increase the provision of his widow—the memorandum on the envelope is strongly confirmatory of the intention of the deceased—it might be made in order to render more clear the alterations in the will; and, also, to have effect, if a more formal will should not be drawn up.

If the deceased meant these alterations as a *substratum* for a new will, it does not seem probable that he would have written this indorsement on the envelope—again it is pleaded that the instrument was put away securely in his repositories with money, and other papers of concern—it was not at hand, as if he was deliberating upon it—his death was not sudden, which confirms the idea that he did mean and intend this paper to operate in its present form—the probability of this is strong, if he lived on affectionate terms with his wife.

The circumstances taken together lead my mind strongly to the conclusion, that the deceased did intend this provision to be made for his wife—and I shall admit this allegation to proof.

The counsel should consider in what way probate may best be prayed. There is a strong impression on my mind, that by granting probate I shall carry into effect the intentions of the deceased. (b)

1814.
*Hilary
Term.*

DICKENSON
v.
DICKENSON.

HARRIS v. BEDFORD, formerly MANOOCH.

1814.
*Hilary
Term,
Jan. 29.*

JUDGMENT.

Sir JOHN NICHOLL.

The facts of this case are beyond all controversy; for they are admitted in the answers. The will is in the handwriting of the deceased, concluding in the following terms:

The presumption of law against a will having an attestation clause unwitnessed, repelled.

“This being written throughout with my
“own hand, I am led to believe, from counsel’s opinion, that it will stand good in the
“eye of the law. I, therefore, revoking
“all former wills by me made, in witness
“whereof set my hand and seal the seventh
“day of January, one thousand eight hundred and nine.

Jan. 7, 1809.

Signed, sealed, and declared
by the testator, F. F. Manooch, as his last will and testament in the presence
of us.

“F. F. MANOOCH.”

(b) No further opposition was offered in this case; but on the 20th of July, 1818, Probate was taken of the will as propounded with the alterations in pencil.

1814.
Hilary
Term.
HARRIS
v.
BEDFORD.

From the circumstance of there being no witnesses to the attestation clause, the Court is bound to presume that the deceased intended to do some further act—certainly the paper is imperfect—and the presumption against it must be repelled, either by its being shewn that he intended it to operate in its present form, or that he was prevented from finishing it by the act of God. It differs from the last case (c)—for there was nothing in that from whence it could be inferred that the deceased intended to do something more—here, certainly, such an intention is to be presumed—but the presumption is slight, and may be repelled by slight circumstances. He was a military man, had lived much abroad, and was unacquainted with business.

The following circumstances shew that the deceased intended this will to take effect—he left a natural son—brought up with great care and attention, and treated with great regard, till the time of his death—his wife and daughter were provided for by his marriage settlement—the object of this will was to divide his property into thirds between his wife, his daughter, and his natural son—his wishes on this head are strongly expressed in a letter which has been exhibited.

“Believe me, my dear Henry, when I assure you that my wife, little Anne, and yourself, are the most particular considerations I have on earth; and that whatever I may say or do, with regard to either, proceeds from the strongest affection.”

It is impossible that words can stronger express his intention than these do. He addressed this letter to his son about a fortnight before his death—it is admitted that the deceased was a reserved man in his affairs, except to his wife—and it is proved he, *at different times, and particularly within a short time of his death, declared to her that he had made his will, which he produced and read all over to her.* This is a sort of publication of it in its present form—the leaving his natural son unprovided for, was the thing furthest from his mind. I am convinced that he died with the full intention that this paper should operate as his will; and I pronounce for it as such.

1814.
*Hilary
Term.*

HARRIS
v.
BEDFORD.

1814.
Hilary
Term.
Feb. 10.

NICHOLS and NICHOLS by their guardian v. NICHOLS.

A will, not
 written with
 a testamentary
 intention,
 set aside.

THOMAS NICHOLS of Southampton died on the 23d of January, 1813—his wife survived him : and he left a son and daughter, by a former wife, who were minors. The children appeared by their guardians ; and propounded the following paper as the last will of the deceased.

“ I leave my property between my children ; I hope they will be virtuous, and independent ; that they will worship God, and not black coats.

“ July 30, 1803.

“ THOMAS NICHOLS.

“ Witness Thomas King.”

The widow opposed the validity of this testamentary paper, and prayed the Court to pronounce for an intestacy.

Burnaby and Herbert, in support of the will.

The paper was executed and written by the deceased, a professional person ; and found after his death in the custody of the friend into whose hands he had delivered it—it speaks for its own validity—the attention of the deceased was particularly called to consider what would be the operation of such a paper—there was a moral approbation of its contents—it makes the same distribution that the law would have made ; if he had forgotten it, that circumstance would not impeach its validity—at all events the evidence of the only witness examined is wholly

inadmissible, as it is in direct contradiction to his own act.

Adams and Lushington, contrà.

The instrument has no appearance of a testamentary paper ; it is admitted to have been written in a moment of levity, on a careless occasion, after dinner, and after wine—it was not intended to be operative, but to be imitative of another paper ; there was no publication of it :—the writer left it to its fate—King took it up, wrote his name without being asked, and locked it in his iron safe. There is a total failure of proof, that the deceased had a mind and intention to consider it as his will.

Burnaby and Herbert, in reply.

The words distinctly amount to a publication, “there is as good a will, as I believe I shall now make :” the whole rests on the testimony of one witness—his conduct is most important, because it is indirect opposition to his testimony ; if King had died at any moment within the last ten years, no objection could have been raised to the validity of the paper.

JUDGMENT.

SIR JOHN NICHOLL.

This is a case under singular circumstances—the deceased died in January, 1813, leaving a widow, and two children by a former wife—the will is in these terms :

“I leave my property between my children ; I hope they will be virtuous and independent ; that they will worship God, and not black coats.

July 30, 1803. “THOMAS NICHOLS.
“Witness Thomas King.”

1814.
Hilary
Term.

NICHOLS
v.
NICHOLS.

1814.

*Hilary**Term.*

NICHOLS

v.

NICHOLS.

It is proved and admitted that this paper was written and signed by the deceased, and that he was of sound mind at the time ; but Thomas King, a subscribed witness, gives the following account of the transaction :—

“The deponent is steward to Sir Charles Mill, whose solicitor the deceased was—he knew him intimately for twenty years—when they had any business to transact together, it was their custom to dine together at the house of each other. On the 30th of July, 1803, the deceased dined with the deponent—after dinner they adjourned, as usual, to the deponent’s book-room, where they drank their wine, which never exceeded a pint each, with, perhaps, a glass or two of white wine. The deponent and the deceased used to talk familiarly with him on many subjects—he was in the habit of ridiculing the tautology of lawyers, who, he said, employed a vast number of unnecessary words—that having finished their wine, the deponent took from a drawer a paper which he had drawn up as his will ; and, shewing it to the deceased, said something ridiculing lawyers spinning out papers, and asked him it if was not as good a will as if it had been spun out to a great length by a lawyer—the deceased replied, not only a valid will, but a devilish good one ; and, asking for pen and ink, took a sheet of paper, and writing the paper propounded, threw it towards the deponent, saying, very carelessly, there, that is as good a will as I shall probably ever make. These he recollects to have been the very words spoken—he did not request

"the deponent to take care of the paper, or say
 "another word about it—or, from that time to his
 "death, ever allude to it—and the deponent verily
 "believed that he never recollected that such a
 "paper was in existence—a very short time after-
 "wards the deceased shook hands with the depo-
 "nent, and went away, leaving the paper on the
 "table. When the deceased was gone, the de-
 "ponent wrote his name as witness to the signa-
 "ture ; (he was not requested by the deceased so
 "to do) he then folded up the paper, wrote on
 "the back 'the will of Thomas Nichols, Esq., of
 "Southampton, July 30, 1803 ;' and put it into
 "his iron safe, where it remained, with many other
 "loose papers, till after the deceased's death. The
 "deponent does not believe that the deceased,
 "when he wrote the paper, intended to make his
 "will, or that such paper should ever operate as
 "such ; but he always considered, and does still
 "think, that it was written without any other
 "view than in imitation of the paper the depo-
 "nent had so shewn him—a copy of which he
 "annexed to his deposition, and to shew the de-
 "ponent he could exceed him in brevity—and the
 "deponent is confirmed in this opinion by the
 "practice of the deceased on other occasions ; the
 "deponent being in the habit of drawing speci-
 "mens of leases, and other instruments, wherein
 "very few words were used, which he shewed to
 "the deceased ; and he, upon such occasions, uni-
 "formly wrote others still shorter, by way of shew-
 "ing that he could exceed him in brevity. The
 "deponent never considered the paper as the

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*Hilary
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1814.

*Hilary
Term.*

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“deceased’s will, but as the deceased’s specimen of
“a short will: and as such he signed his name as
“a witness to it, and endorsed it, and put it in his
iron safe. He further saith, that his intimacy
“with the deceased continued till his death in
“January last—that, during his illness, he visited
“him about once a week for five weeks together
“—upon those occasions, not considering the afore-
“said paper as intended as a will, and under-
“standing from the deceased that he had made no
“will, he was very urgent with him to make
“a will—the deceased’s answer to such applica-
“tions being, that he did not know but that the
“law would make a better will, or as good a will,
“for him as he could make—but the deponent and
“others having pressed him to make a will, the
“deceased did at length, shortly before his death,
“say, that when he got a little better he would,
“to satisfy his friends, make a will; but this he
“did not live to do—he grew worse daily—that the
“deponent never alluded to the paper writing, for
“he had himself forgotten that such a paper was
“in existence.”

The same witness, in answer to an interrogatory,
says, “that a few days after the death of the de-
“ceased, Sarah Nichols, his widow, told the re-
“spondent she could find no will; and asked him,
“as he was the confidential friend of her husband,
“if he had left a will in his hands. He replied, No,
“he never left any will with me; but added that,
“if it would give her any satisfaction, he would
“search his papers, which she requested he would
“do, saying, that she concluded from the intimacy

“that subsisted between them, if her husband had left any will, with any one, it would be with the respondent. The respondent had then no thoughts of the paper in question; nor did the circumstances of the same having been written occur to him, till, on turning out the various papers that were in the safe, he found it there—that the respondent thought so lightly of it when he went to Sarah Nichols, and shewed it her, that he said, This is all I have got, and you may put it into the fire. The respondent does verily believe that the deceased departed this life without the least recollection of the paper being in existence—that the deceased and his wife lived on the best terms together, and the greatest love and affection subsisted between them.”

1814.
Hilary
Term
NICHOLS
v.
NICHOLS.

This is the account given by the only witness, whose name is subscribed to the paper; and if this evidence can be received, and is to be credited, this is not the will of the deceased, for it wants the great requisite, the *animus testandi*; it was not written with the mind and intention to make a will. A question has been made whether this evidence can be received. I am of opinion that it can and must be received;—it is the evidence of the attesting witness, who must be produced, and whose testimony is common to both parties. What credit may be due to it is another question. A witness attests a will for the purpose of giving authenticity to the *factum* of the instrument: the *animus testandi* is the very point into which the Court of Probate is to enquire—the mere act of witnessing or signing does not exclude, of neces-

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 {
 NICHOLS
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 NICHOLS,

sity, the absence of the *animus testandi* any more than the mere act of cancellation excludes of necessity the absence of the *animus revocandi*. It may have been signed under duress, or under other circumstances when there was no intention to make a testamentary disposition.

The evidence is admissible, but is certainly to be received with great caution, the paper being dispositive; and the witness having signed it must be heard with jealousy to depose against the effect of his own act—it is true the attestation clause is not in the usual form; it is merely the word witness:” but still that infers an attestation of the act of the deceased; and the witness must be carefully heard by the Court.

The evidence then being admissible, the next question is, Does the Court believe this account? The witness is in a respectable situation in life; wholly unimpeached in credit and character; the confidential friend of the deceased; and no possible inducement is suggested why he should declare upon oath a false account of the transaction—the account he gives, though whimsical, is neither unnatural, nor improbable; the internal evidence of the paper strongly corroborates it, as do also the extrinsic circumstances—he says the deceased wrote it in order to shew in how few words a will might be written—there is something of levity in the expression “Worship God, and not black coats:” it is in imitation of one written by the witness; his is in these words:

I give and devise all my property, real and personal, to Mary my wife, to be divided by her,

as she shall think proper, between all my children, either in her life-time or by will (reserving enough for her own comforts.) I hope my children will obey their mother, love each other, and be pious and virtuous; that they worship God and not man, nor ever practise the trade of a butcher, nor ever accept of any place in the navy or army. But they will endeavour to plant and extend happiness, to raise cottages for industry and honesty, and make the desert smile with plenty and innocence; that they will despise only those who monopolize the earth for the gratification of their own luxury and pride; and that they will look up to none as their superior but those only who exceed them in good works; and never treat any of God's creatures with contempt but the proud and profligate; and never bend their knee but to their God. This is my will; and I do hereby appoint my wife sole executrix thereof. In witness, &c. &c.,

Signed,

Thomas King.

Upon comparing the two instruments, I think the one a compressed imitation of the other—the admonitory part in the one occupies twenty lines; in the other the same idea is given in more concise words. It is an extremely strong circumstance that it makes no alteration in the disposition the law would have made of his property. For what purpose could he have intended this paper? In it there is no legacy, no executor, no guardian to his children—this is a strong confirmation that it was not written *animo testandi*, but for the purpose mentioned by Mr. King—subsequent circumstances still more confirm this; the deceased afterwards married—he

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Hilary
Term.

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lived on terms of affection with his wife, and he said he had no will, that the law would make a good will for him—so that it was his intention that his widow should possess, after his death, the provision which the law would give her—during none of these conversations does he make any allusion to the existence of this paper—his forgetting it, would not operate as a revocation; but it is a circumstance to shew that he originally never intended it as a testamentary paper. There is little doubt that when he threw it across the table, he meant it should be put into the fire.

With all the possible caution that the Court can exercise where a witness is deposing against his own act, I am yet fully satisfied in my mind and conscience that the deceased never intended this as his will: I, therefore, pronounce against it; and decree administration to the widow, her husband having died intestate.

Hilary
Term,
Feb. 10.

BARCLAY v. MARSHALL, formerly KEITH.

A creditor is entitled to a statement of the effects which have come into the possession of the executor.

ELEANOR BARCLAY, a creditrix of James Keith, deceased, took out a citation against Mary Keith, his executrix, to bring in the will, and accept or refuse probate of it, and to exhibit an inventory of the effects. Mary Keith brought in the will; accepted the probate; and, after some delay,

exhibited an inventory. Eleanor Barclay gave in an allegation, pleading certain sums of money as received by the executrix, which were omitted in the inventory. Whereupon Mary Keith gave in a declaration instead of an inventory, in which she admitted one of the sums pleaded to have been omitted.

1814.
Hilary
Term.
BARCLAY
v.
BARCLAY.

Jenner, for Eleanor Barclay, moved for the admission of the allegation.

Stoddart contrà.

The only object of this application is to falsify an inventory.

JUDGEMENT.

Sir JOHN NICHOLL.

The object is not to falsify an inventory, but to obtain a full one. Why did not the party give in her answers to the allegation instead of a declaration? She is bound to answer; the very use of giving in an allegation in objection to an inventory is, to get a specific answer to a specific averment. Many persons will evade, under a general denial, that which they will be afraid to deny specifically.

I think the creditor is entitled to have a *constat* of the assets that have come to the executors' hands.

I shall admit this allegation.

1814.
Hilary
Term.
Feb. 26.

BENNET v. JACKSON.

A nuncupative
will not es-
tablished for
want of a suf-
ficient *rogatio*
testium.

MRS. SUSANNAH JACKSON, of the city of Bath, died a widow, on the 10th of May, 1813, leaving ten children: on the 29th of April, preceding her death, being in her dwelling-house at Bath, and in her last sickness, she summoned several of her children, and the daughter of the person with whom she lodged, to her bedside, and declared herself to the following effect:

“ Joseph Henry Bennett, your brother, is
“ my heir, and all that I have is his. Tell
“ him to pay all my debts; give my love to
“ him, and tell him to take me home, and by
“ no means to leave me here; tell him to be
“ a father to you children. I know he will
“ for my sake; I know the goodness of his
“ heart; he will be a kind father to you.

“ Edward my wish is that you should fol-
“ low the profession I have chosen for you;
“ and let no one persuade you from it.

“ With respect to you three girls, if George
“ and Keller send for you, you must go; but
“ never do any thing without consulting
“ your brother Joseph, not even the smallest
“ thing.”

These words were reduced into writing on the 13th of July following, and attested by three of the persons present at the time they were uttered; and were now propounded by Joseph Henry Bennett, the eldest son, as a *nuncupative* will.

Decrees were taken out against the other children, to shew cause why a probate of the aforesaid will nuncupative should not be granted to him as the sole executor named therein according to the tenor thereof. The process of the Court was served on all of them; but no appearance was given for either of them.

JUDGMENT.

SIR JOHN NICHOLL.

Probate is called for of a *nuncupative* will; minors are concerned. In cases of this description, the statute enjoins several requisites—the principal one is the *rogatio testium*, the calling upon persons to bear witness to the act—my doubt is, whether, there is sufficient evidence here to this point:—the words of the statute (*a*) have always been strictly construed; it was so held in *Parsons v. Miller*.

1814.
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(*a*) And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury, be it enacted by the authority aforesaid, that from and after the aforesaid 24th day of June no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of 30*l.* that is not proved by the oaths of three witnesses at the least, that were present at the making thereof; nor unless it be proved that the testator did, at the time of pronouncing the same, bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will was made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised, or taken sick, being from his own home, and died before he returned to the place of his or her dwelling. 29 Car. II. c. 3. s. 19.

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In that case (b) a paper was propounded as nuncupative; the credit of the witnesses was unshaken: but the Court thought the words addressed to the witnesses did not in effect desire them to bear witness. The deceased himself is required by the statute to bid the persons present bear witness.

In Darnbrook and Sawyer v. Silverside, (c) it approached very near a *rogatio testium*; but it was said by the counsel in that case, that Sir George Lee had rejected an allegation on similar grounds.

Now, in the present case, at the beginning of the transaction, there was clearly no *rogatio testium*: the statement is, "that the deceased having called Anne Jackson and Elizabeth Warren Jackson (a minor) her daughters, to her bedside, and spoke to them of the disposition of her effects; and Edward Bennett Jackson, her son, being sent for, to be also present to hear his mother's declaration; and her said three children being all present, and at her bedside, she, the said Susannah Jackson, did, in the presence of us, whose names are subscribed (the three attesting witnesses) and of the said Elizabeth Warren Jackson, declare and direct, &c."

This is the statement; and neither in this nor in the words spoken is there any thing to shew the *animus testandi*.

There is no declaration that the words were spoken with the intention of making a will at the

(b) Parsons v. Miller, Prerog, Hilary Term, 1797,

(c) Darnbrook and Sawyer v. Silverside, Prerog. 1767.

time : which the statute particularly requires. The affidavit goes on to state that Susannah Jackson, "after making the declaration aforesaid, observed "that it should be committed to writing : but afterwards said, that the deponent's hearing it "would answer the same purpose ; and, lastly, "these deponents make oath and say, that the deponent, Ruth Sidewell, having afterwards left "the bedroom of the said deceased, for a short "space of time, unperceived by her ; the deceased, "who had noticed the return of the said Ruth "Sidewell, said, 'Mrs. Sidewell, why did you "leave the room ? I wished you to witness all I "had to say to my children.' "

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I have considerable difficulties in holding this to be a sufficient compliance with the statute. It does not appear that the words were spoken *animo testandi* ; there is no *rogatio testium* at the beginning, no declaration that the words were spoken with the intent of making a will at the time. The words of the statute are very strong, and must be held strictly.

Allegation rejected.

1797.
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Feb. 17.

PARSONS v. MILLER.

DR. Laurence.

The statute of frauds meant to place extraordinary checks on such wills, as being more particularly liable to fraud—they are to be construed strictly. The opportunity of detecting fraud would not so readily occur; they might be set up by a conspiracy of the persons present—in this instance, also, there is no *rogatio testium*.

Dr. Swabey, on the same side.

Sir William Scott, in support of the will.

We admit the *rogatio testium* to be necessary; but no particular words are required by the statute: it is sufficient if the Court is satisfied that the deceased meant to do a testamentary act, and wished the persons to attest it. The statute does not require them all to attest; it says "*or some of them*;" if he signified it to one, it is sufficient—it is a rational compliance with the statute.

Dr. Nicholl on the same side.

JUDGMENT.

Sir WILLIAM WYNNE.

The paper before the Court is propounded as the nuncupative will of John Saunders—it has been reduced into writing in the usual manner, purporting that it is by the desire of the deceased; and it is signed by three witnesses.

Objection has been taken to the credit of the witnesses; but it is of no weight—it is said two

of them are relations; this is no objection in this Court, as it would not be in another. The history is perfectly credible; no person can doubt that the fact passed as stated.

The only question is, whether what passed is sufficient to satisfy the statute 29 Car. II. c. 1. s. 9.

It is in evidence that he spoke these words: "50*l.* for Anne Bedford that was; 50*l.* for ———; 50*l.* for ———; and two bonds I give to ——— and all interest."—He spoke these words, 1st, before one witness, then before two, then again before three. The witnesses speak fully to capacity. But the question is, whether these words were spoken with the expression of the testator requiring them to bear witness.—I cannot find any such expression.—The conversation began between the deceased and Mary Parsons—he did not begin to converse about the will; she began by enquiring if he had settled his affairs—he replied he had not made a will; she asked if she should send for Mr. Mitchell to make one—he said he was too ill to make a will—she asked if there was any thing he would have done, and she would see it done—he began at once, repeating the words pleaded, but without desiring her to bear witness.—She then, thinking it necessary to have another witness, said "she would call up Mary Carter that she might hear and be a witness." The deceased answered, "*Do.*" This is the only word of the deceased's expressing any wish on the subject. She called Mary Carter, and said, Now repeat before Mary Carter, and she will be a witness—this is a *rogatio testium*, but not by the testator—I cannot

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hold here *qui facit per alium facit per se*. The testator repeated 50*l.* for *Anne Wilford*, &c.

The witness says, that having heard that three witnesses were necessary for a will; of her own accord, she called Samuel Clarke; and, when he came, Parsons said, Do you take notice what Mary Saunders is going to say; and then desired her to repeat it, which she did. She does not prove that he did, but she proves that he did not express any words which are made absolutely necessary by the statute—I do not say there was any ill intent on the part of the witness; for the deceased had said he was not capable of making a will on being told by Mrs. Parsons she would see it done—she repeats the four legacies, &c. twice over—it is a rational compliance with the statute to say this is not within it. The statute is to be taken strictly—it meant that persons should not get about the deceased, and ask him questions; but that it should originate from himself—I think this so clearly necessary that if no *rogatio testium* should be pleaded in an allegation, it must be rejected.

In *Darnbrook and Sawyer v. Silversides*, before Sir George Hay in 1767, there was a decree to shew cause why an administration should not be revoked and granted with a nuncupative will annexed. It was pleaded that the deceased was ill in bed of the sickness of which he died the next day at his own house; and that, with the intent to make a nuncupative will, he did utter words in the presence of three witnesses. Shean asked “if he had made his will;” he said “No.”—Shean said, “a verbal will would be sufficient, as there were a

sufficient number of witnesses present ;" he said "he knew it would," and then he uttered the words pleaded. The Court said it would be very unwilling to reject any plea, if the parties could possibly obtain the effect of their prayer ; but that the Court was tied down by the statute, and it did not appear that the deceased addressed himself in any such manner as was required, before the words were spoken ; and the allegation was rejected. It was said by counsel, in the hearing of that cause, that Sir George Lee had, in 1755, rejected an allegation on the same ground.

Here the fact is pleaded, but not proved.—I think I am bound, especially under that case, to say that this will is not proved to be made as the statute requires ; and I must pronounce against it.

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ARCHES COURT OF CANTERBURY.

The office of the judge promoted by
CARR *v.* MARSH.

1814.
Easter
Term.
April 25.

*By Letters of Request from the Commissary General
and Official Principal of the diocese of Chichester.*

A bishop cannot consecrate a chapel, or authorize a person to preach in it without the consent of the incumbent of the parish. The office of the judge allowed to be promoted, not upon the merits of a case, but from the nature of the suit.

THE Reverend Robert James Carr, Vicar of Brightelmstone, in the county of Sussex, cited the Reverend William Marsh for publicly preaching and administering the Holy Sacrament, and performing other ecclesiastical duties and divine offices in a certain building not consecrated, or in any manner whatever dedicated to divine worship according to the rites and ceremonies of the Church of England, without a sufficient licence or authority. The Reverend William Marsh appeared under protest, denied the jurisdiction of the Court—and, after reciting the 52 Geo. III. c. 155, alleged that the building mentioned in the proceedings was a chapel built by subscription for the purposes of public worship, according to the rites and ceremonies of the Church of England, at the particular instance of the Reverend Robert

Carr himself, and under the sanction of the bishop of Chichester, within whose diocese the parish of Brightelmstone is situated—that according to the tenor of the deed of trust relative to the government of the said chapel, to which the Reverend Robert Carr was also himself a party, the appointment of the minister to officiate in the said chapel, became vested in certain persons, who, upon the recommendation of the Bishop of Chichester, appointed the Reverend William Marsh to the chapel, with the consent and approbation of the Reverend Robert Carr—that, upon this appointment, the Bishop of Chichester authorized the said William Marsh to commence the performance of divine service in the chapel, without the usual and formal licence—he further alleged that due notice of the intended opening of the chapel was given to the Bishop of Chichester, as required by the act of parliament; and the Reverend William Marsh officiated as minister therein, on the 25th of July, 1813. And, finally, that the Reverend William Marsh would have been by law entitled so to officiate, even had there been no authority, in that behalf, given to him by the Bishop of Chichester. That inasmuch as the Reverend Robert Carr had given his consent to the building and opening of the chapel, and the appointment of the said Reverend William Marsh as minister of it—it is not by law competent to him to promote the office of the judge in the present suit—nor as the said William Marsh has duly complied with the provisions of the statute aforesaid and commenced the performance of divine service in the chapel, with the know-

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ledge and approbation of the Bishop of Chichester, and has never since received any intimation or direction from the said Lord Bishop to discontinue the same—is it competent for any person now to promote the office of the judge in this behalf.

On the behalf of the Reverend R. Carr it was alleged that the statute of the 52 Geo. III. c. 155. was irrelevant—and that the citation was preceded by, and issued in pursuance of letters of request under the hand and seal of the commissary general and official principal of the Lord Bishop of Chichester, which were duly presented and accepted; and, consequently that the jurisdiction was well founded.

Burnaby and Jenner, for the Reverend Mr. Marsh.

The act of 52 Geo. III. must be considered as extending to the church of England; and, as general, to all Protestants. The act of William III. goes as far as the latter act, with respect to Protestant dissenters; therefore, if the latter did not include the Church of England, it would be nugatory and mere surplusage.

In one of the most populous districts of the country a subscription has been entered into for the purpose of building a chapel for the accommodation of the poorer classes of society—this was done with the knowledge of the incumbent (Mr. Carr) and under the sanction of the bishop—a deed of trust was executed—Mr. Marsh was recommended to perform the service of the chapel. The incumbent himself was a subscriber and principal mover in

the business. Mr. Marsh received the appointment from the trustees. In March, 1813, Mr. Carr suggested that some doubts having arisen as to Mr. Marsh's religious tenets, it was necessary that he should satisfy the bishop on this head.—Mr. Carr then suddenly objected to the opening of the chapel on the evening before it was to have been opened, without expressing any reason for his conduct.

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Under these circumstances we contend that it is not competent to any one now to promote the office of the judge against Mr. Marsh, he having acted under the sanction, and with the approbation, of the bishop, and that sanction never having been withdrawn. The office of the judge cannot be promoted without the approbation of the judge himself.—From Ayliffe (a), Clarke (b), and Oughton (c), it appears that there must be an asking of the ordinary.—How can the bishop proceed *ex officio* *mero* against Mr. Marsh, when he has already sanctioned the act which he is brought forward to impugn? The bishop ought to be a party to this suit.—The bishop may authorize a person to preach any where.

Per Curiam.

Can a bishop consecrate a chapel, or authorize a person to preach in it, without the consent of the incumbent? I should like to hear some authority for that position. The building of the chapel may be a most meritorious act, and the

(a) Ayliffe's Parergon, p. 398.

(b) Clarke's Praxis, p. 132.

(c) Oughton, tit. 150.

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incumbent may be in the wrong—but still he has a legal right.

Argument resumed.

The circumstances of this case seem to form an exception to this doctrine.

Another ground for this Court not interfering is, that an application has been made to the Court of Chancery to compel Mr. Carr to the performance of that obligation by which he is conceived to be strictly bound.

Swabey, contra.

Mr. Carr has the cure of souls exclusively within his parish.—No clergyman can preach in any place, either consecrated or unconsecrated, without the licence of the bishop—the licence of the diocesan is essential to a chapel of this description—it is idle to set up a constructive licence,—a licence must be in writing, and such a one as will bear the test of a court of justice. 48th (a) and 77th (b) canons—are clear to this point. The licence to which

(a) 48th Canon. *None to be curates but allowed by the bishops.*

No curate or minister shall be permitted to serve in any place, without examination and admission of the bishop of the diocese, or ordinary of the place having episcopal jurisdiction, *in writing under his hand and seal*, having respect to the greatness of the care, and the meetness of the party, &c. &c.

(b) 77th Canon. *None to teach school without licence.*

No man shall teach either in public school or private house, but such as shall be allowed by the bishop of the diocese or ordinary of the place, *under his hand and seal*, being found meet, as well for his learning and dexterity in teaching, as for sober and honest conversation; and, also, for right understanding of God's true religion, &c. &c.

the law looks must be *in writing* and under the hand and seal of the bishop. The conduct of Mr. Marsh appears to be in defiance of the incumbent, and of the ecclesiastical law; the facts stated may be relevant or not to the merits of the case—but they are wholly irrelevant to the present question, which is simply that of jurisdiction.

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JUDGMENT.

SIR JOHN NICHOLL.

This is a cause of office promoted by the Reverend Robert Carr, against the Reverend William Marsh, for performing divine offices in a place not consecrated according to the rites of the church of England, and without any authority from the bishop.

An appearance has been given under protest for Mr. Marsh, denying the jurisdiction of the Court—and the sole question, properly before me now, is, whether the Court has any jurisdiction.

The cause comes by letters of request from the Commissary General and Official Principal of Chichester—Chichester is within the province of Canterbury—as to the place, therefore, there can be no doubt that the jurisdiction is founded. As to the nature of the offence set forth in the citation—surely, under the general ecclesiastical law, unless it has been recently altered, it must be an offence under the ecclesiastical jurisdiction—a minister of the church of England is amenable to this Court if he performs divine offices in a place not consecrated without the leave of his diocesan.

There is jurisdiction then over the place and person unless the law is altered—it is contended

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that it is altered by the act of 1812—this statute however, in my judgment, does not, in the slightest degree, apply to the case—notwithstanding the word “Protestant” stands without “dissenter” in one clause (a)—still, taking the preamble and the context together, and especially considering the proviso in s. 3, I am clearly of opinion that it was not intended to alter the laws and discipline of the Church of England—but confined to dissenters.—The place here is not a place to be certified under the toleration acts—but a chapel for worship according to the Church of England.—If the act would bear the construction contended for, it would be a complete alteration of the fundamental laws of the Church of England.

It is said there is a discretion in this case—and that the Court should not allow the office of judge to be promoted in such a cause—but the cause must be tried before we arrive at this conclusion—otherwise we enter upon the merits of it prematurely.—Application is always made to the judge before a citation issues in a cause in which his office is promoted; but that is not for the purpose of considering the merits of the case; but from the nature of the suit.—Whether it be of ecclesiastical consueance, or the fitness of the person to be made responsible for costs to the other party.

There are several instances of suits of this sort originating with the vicar—indeed, he is not only a competent, but the most proper person to promote them; there can be no doubt as to his responsi-

(a) 52 Geo. III. c. 155. s. 2.

bility for costs ; and besides as vicar his rights and duties are most affected—if he had consented to all the transactions which have occurred, and even to the appointment of the party proceeded against—still, if he officiates without the licence of the diocesan, by which I understand only a licence in writing, I do not apprehend that would be any bar to proceedings of this description, or any ground to stop proceedings here in the first instance.—If Mr. Carr has acted improperly, it may be a ground of consideration hereafter for costs ; but it is none with respect to a protest.

It has been objected that a suit is pending in the Court of Chancery ; but the Ecclesiastical Court cannot be called upon to stop its proceedings on a question of discipline against a minister of the Church of England, because proceedings have been instituted elsewhere respecting his civil rights.

The history set forth in the act is irrelevant to the question of jurisdiction—the Court must be careful to support its practice—to keep that which is matter of protest separate from that which is matter of defence. If it could be alleged that the transaction had taken the most formal shape,—that there had been a regular deed,—that the chapel had been regularly consecrated,—that Mr. Marsh had been appointed by the vicar,—and regularly licensed by the bishop—in short, if the most complete defence could have been made out, still that would not bear upon the protest.

The utmost now stated is something of constructive and implied assent given by the vicar, and approved by the diocesan.

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The point, therefore, which the Court has to decide seems so plain and clear, that it is difficult to account for the irregular course which has been taken—if I could imagine that this was done merely to gain time, and to keep the chapel open, I should not hesitate to condemn the party in costs as prayed—but seeing the highly respectable names signed, and the laudable purpose for which the chapel was intended, *viz.* that of giving instruction to the poor according to the rites of the established Church, I will not allow myself to suspect that the parties have resorted to this protest for the unworthy purpose of keeping the chapel open longer than they otherwise could have done in defiance of the law. But if the whole object disclosed in the affidavit, and the act (as has been suggested) is only to obtain some opinion from the Court as to the general merits of the question—though it would be irregular; yet to put an end to litigation—to restore harmony in the parish—and between parties who have gone hand in hand to a certain degree—for so laudable an object I would not, on mere form, decline to intimate my present impression.

I apprehend that by law no person can procure divine service to be administered without the consent of the incumbent, and the licence of the bishop (to which, in some instances, must be added the consent of the patron)—and that the person officiating without such consent is subject to ecclesiastical censures.—And, seeing how the law protects the rights of the incumbent and the ordinary, I think the party in this case would do well to.

take the advice of his counsel whether this or any other minister can, without the leave of the incumbent, be justified in officiating within his parish, and whether the Court will not be bound to inflict punishment for such an offence if proved. The Court has no discretion to consider whether the vicar has unhandsomely withheld leave—whether he has or not I do not mean to say, or in any way to intimate.

Under such advice the matter might be settled, and the very desirable object in view might go on to the satisfaction of all parties.

I shall overrule the protest.

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Term.
June 27.*

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit for cruelty and adultery brought by the wife. The libel was opposed, but admitted. Eighteen witnesses have been examined upon it—there is no allegation on the part of the husband. It will be sufficient to state the facts proved, without detailing the evidence.

The parties were married in 1794;—she was a widow with a large fortune; he a minor and an officer in the life guards—the disparity in their years

A separation decreed at the suit of a wife, for the cruelty and adultery of her husband.

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did not promise happiness. In 1795 he began to treat her with indifference; and proceeded to acts of violence, though not proved to be for the purpose of inducing her to give up her property. In December, 1795, she went to church in her own carriage, and staid to receive the sacrament. While she was there he ordered the horses to be sent to Tattersall's to be sold, and told the servants not to obey her—she insisted on keeping the horses, which were her separate property; and the sale was prevented. On his return home there was a quarrel; he locked her up in his dressing-room, and went out; she was released by the servants. On his coming home, and finding her at supper below with his sister, in a passion he seized her by the wrists in order to force her up stairs: the servants were deterred by his threats from interfering. She opened the door, and called the watch; two neighbours came in; she escaped to Mr. Dashwood's at next door; and went with a Mrs. Purchase, who was there, to her house.

A separation took place by consent in August, 1796—she agreed to allow her husband 200*l. per annum*, in addition to what he had of his own.—The separation continued till 1800; in that time he formed an adulterous intercourse with a Mrs. Trefusis.—In 1800, through the interference probably of his friends, who resided much with Mrs. Smith—a reconciliation took place.—They went to Pendyffryn, where she was building a house—she was prevailed upon to execute a deed by which her property was settled on him and his issue—she came to town in 1807, and lay in of a daughter—

he went to Pendyffryn—there were two maid-servants there—he slept in his dressing room, and lived in it, and had one of the maid-servants to make his bed—he had, therefore, full opportunity to solicit their chastity—which he did not pass by—the first he attempted seems to have been attached to another person and resisted him: with the other he formed a criminal connexion: this is proved on her own confession.

When his wife returned to Pendyffryn; when all the affections of the father and the husband should have been excited—on pretence of her nursing her child, but for the purpose of keeping up his connexion with the housemaid, he slept apart from his wife.— Soon after there was an act of violence, which, from defect of memory in Major Hamilton (who deposes to it) is not clearly set forth—but she complained, in the presence of Major Hamilton, to her husband. The next day he took the child with such violence from her as to endanger both one and the other; and he said if she resisted she should be confined as a mad woman—Major Hamilton states his memory to be defective; but, from all he remembers of her character, it was mild and gentle. Soon after this she appears to have discovered his intimacy with Hannah Dod: she put a letter on his table remonstrating—and stating that she must leave the house if Hannah Dod was not sent away. This letter producing no effect she applied to Mr. Lloyd to remonstrate with her husband, which he did, and together with Major Hamilton, endeavoured to impress upon him strongly the impropriety of his con-

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duct, but he persisted; they repeated this to him, and expressed their hopes that he would relent—he did send Hannah Dod away; but only to abandon his wife and child, and to live in adultery with Hannah Dod, which he did at West End. It is fully proved that Mrs. Smith continued to reside at Pendyffryn, till she had no longer means so to do. She went to her brother, and occasionally to Leamington. Smith returned to Pendyffryn, followed by Hannah Dod, who lived with him as housekeeper. He thought proper, about two years afterwards, to claim the rights of a father—he went to Leamington, and insisted peremptorily on taking the child—Mrs. Smith, who is described by the witnesses as a most tender mother, said, “If he takes the child, he must be troubled with me also.” This he refused. She said he might as well take her life as her child from her: after some hours, he was prevailed upon to allow his wife to return to Pendyffryn—refusing her offer to come and live in the neighbourhood in some place where he could see the child continually.

In this conduct it is clear that she was solely actuated by maternal feeling for the child—not by any consideration of what had passed—she slept in a separate room with her child and a maid servant. What was the conduct of the husband? He sleeps on a separate floor, and Hannah Dod had ostensibly a separate room: but there can be no doubt but that she frequently partook of his bed. He treated his wife with the most marked disrespect and contempt; he took his meals with her, but seldom spoke to her—she had no part in the management

of the house or the family; that was vested in Hannah Dod—Hannah Dod was the constant companion of his walks, and the child was with them—Mrs. Smith endures all this insult and indignity for the child's sake—at last he determined to rob her of this her only comfort. The child was a little unwell—some trifling medicines were given—she got quite well again—she went out to dine at Conway—he had the child's bed taken down, and put up in his room—on her return she asked him if he meant to take the care of the child from her—he said he did, for she had treated her ill—this was done with the sole view, as the witnesses say, of distressing his wife; her judicious care of the child is proved: he persists in his determination to take care of the child; to take it from a mother to sleep in a bed-room which was no doubt the scene of his constant adultery. When she left her husband, on this remonstrance, he called her back to shut the door. This trivial circumstance in such a moment of distress, is such an act of unfeeling insult, as proves, to my mind, the tyranny of his disposition, and shews her passive obedience and entire submission to his will.

Deprived of the only inducement she had to reside in this scene of insult, of disturbance, and of profligacy—she quits the house, and goes to that of a clergyman in the neighbourhood—she wished to leave her own maid to take care of the child; even this he refuses—she returns to pack up her clothes—he makes this a pretext for refusing to allow her to see her child, not only then, but ever after. Ever since this, the parties have been living

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in a state of separation; the husband in adultery with Hannah Dod, and in possession of his daughter; depriving the mother (to whose moral character no blame is imputed) of the only comfort and satisfaction of her life.

This is the history of the facts—the conclusion is short—adultery is proved, and that alone entitles the wife to a separation. Cruelty, in my judgment, is also proved. Here is violence preceded by deliberate insult and injury. The sending away her horses, and putting them up to sale, while she was at church;—the forcibly carrying her and confining her to her room; afterwards attempting forcibly to carry her back to *her place of confinement*—the forming an adulterous connexion with her maid—the keeping that servant in the house, notwithstanding the remonstrances of his wife and her friends—the deposing his wife from the management of his family, and vesting it in this prostitute—such circumstances have always been held by the Court, not merely as acts of adultery, but as connected with cruelty. In addition to this, there is his conduct respecting the child—notwithstanding the pretext of paternal right, the exercise of which, courts of justice will not be disposed to scan too nicely; yet here it was done, as has been shewn, merely to distress his wife—this is marital tyranny—it is as clear an act of deliberate and unmanly cruelty as can be committed.

Upon the whole, I have no hesitation in holding the libel proved as to cruelty as well as adultery—and I decree a separation to the writ *à mens et toro*.

PREROGATIVE COURT OF CANTERBURY.

HUNTINGTON v. HUNTINGTON and Others.

1814.
Trinity
Term.
June 29.

THE Rev. William Huntington, of Pentonville, being taken ill early in the month of June, 1813, went to Tunbridge Wells for the purpose of obtaining the professional assistance of Mr. Stone, his solicitor, who was resident there, in the making and executing his will. For the first few days after his arrival at Tunbridge Wells, he was prevented by the visits of his friends from engaging in any business—but on the 27th June he sent for Mr. Stone, and told him that he had the whole of *his will in his own mind, and that Mr. Stone should write it all down from his own mouth*; and he particularly desired it might be written on one sheet of paper, as he did not wish it to be long; and he appointed him to come to him on the next day:—On the next morning Mr. Stone came, and the deceased dictated to him No. 1. On the 29th Mr. Stone was prevented by other business from attending Mr. Huntington in the morning; and in the evening the latter (though he had sent for Mr.

Instructions
established as
a will.

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Stone) was too much fatigued by an alarm he had experienced respecting the journey of a part of his family, to dictate to him. On the 30th, however, he dictated the remainder of his instructions contained in papers No. 2. and No. 3.—and approved of them when read over to him—and directed Mr. Stone to have the whole fairly copied and to bring early the next morning a fair copy for him to sign and execute. In the afternoon, a doubt having suggested itself to his mind respecting one part of the instructions, he again sent for Mr. Stone, and explained it to him; afterwards the deceased expressly informed several persons in his family that he had been making his will, and settling his affairs, and had, that morning, finished it. On the next morning (July 30) he was suddenly attacked by a fit, and rendered incapable, and so continued till the evening, when he died,

A caveat was entered by the seven children of Mr. Huntington (*viz.* Gad Huntington, Ruth Blake, Naomi Burrell, Lois Clark, Ebenezer, Benjamin, and William Huntington)—this caveat was warned on the part of Lady Sanderson, the widow of the deceased, who propounded the instructions dictated to Mr. Stone, as containing together the last will and testament of her husband. The instructions were as follows :

“ In the name of God, Amen.—I, William
 “ Huntington, being now in my right mind
 “ and memory, and not knowing the day of
 “ my death, do make and declare this my
 “ last will and testament, in manner and form
 “ following : *imprimis*, that is to say, I leave

“ my body and soul in the hand of my Saviour
 “ in whom I have enabled to believe, and
 “ in whom I am saved. All my gardening
 “ utensils, all my coppers and brewing ves-
 “ sels, all the casks of my cellar, my car-
 “ riages, my horses, and all the furniture and
 “ effects of my house, this I leave and be-
 “ queath to my beloved wife, to be enjoyed
 “ by her as long as she shall live, so that no
 “ room shall be spoiled of its furniture, nor
 “ even my study, nor my book-cases shall be
 “ dismantled. The house which I have built
 “ on the leasehold ground in Gray’s Inn lane
 “ (the rent of which is seventy pounds per
 “ annum) this, and the rents thereof, I give
 “ to my said beloved wife, to be enjoyed by
 “ her, so long as she shall live. Moreover,
 “ the three ground rents of the houses in
 “ Gray’s Inn lane, at nine pounds per annum
 “ each, for the erection of which I have
 “ granted building leases; these rents I give
 “ to my beloved wife, to be enjoyed by her
 “ as long as she shall live. The chapel also
 “ which I have erected on the said leasehold
 “ ground I give my said wife, for her life,
 “ subject to her paying to Mr. Chamberlain,
 “ or whoever it be that succeeds me in the
 “ ministry, the sum of two hundred pounds per
 “ annum out of the profits thereof. The little
 “ piece of ground, which I purchased, Hay-
 “ seldon’s Wood, in Cranbrook, and erected a
 “ double cottage thereon, for the benefit of
 “ three poor aged sisters of mine, and which cost

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“ me better than five hundred pounds, I give
“ and devise to my beloved wife, and her heirs,
“ to do as she pleases with after my said three
“ sisters shall be dead ; and, exclusive of the
“ five thousand pounds my wife’s father settled
“ upon her, and exclusive of the fifty pounds
“ a year annuity likewise, which he settled
“ upon her ; exclusive of these two sums, I
“ have received with my said wife, eight thou-
“ sand six hundred pounds ; three thousand
“ six hundred pounds I received of Mr. Dyke ;
“ and five thousand pounds I received from
“ the Court of Chancery, being the sum her
“ first husband, Sir James Sanderson, left
“ her upon her second marriage ; this sum of
“ eight thousand six hundred pounds I have
“ not diminished ought, but rather increased :
“ there is seven thousand six hundred pounds
“ five per cent., navy stock ; and there is one
“ thousand one hundred pounds lent, the
“ vouchers of which my said wife has got by
“ her ; and, as it is in good hands, I would
“ wish her not to call it in unless necessitated
“ so to do : there are a few more hundred
“ pounds which my said wife knows of, and
“ all these several sums of money, and my
“ power over them, and all that is due to me
“ or may become due to me, at my death,
“ whatsoever the amount, or wheresoever
“ found, I give and bequeath the whole thereof
“ unto my said wife absolutely. At the death
“ of my invaluable wife, I will that all my
“ garden tools, my iron roll, and watering en-

"gine, all my coppers and brewing vessels,
 "all the beer and wine casks of my cellar,
 "my carriages and horses, and all the furni-
 "ture of my house, my library and books, and
 "every thing else appertaining to me, in my
 "said house (except what is, strictly speaking,
 "Miss Sanderson's own) I will that it shall
 "be all sold at my wife's decease; and the
 "money arising therefrom shall be distributed
 "in the following order (that is to say) my
 "son Ebenezer has run through between two
 "and three thousand pounds, in which he has
 "done no good; being very desirous to live,
 "but not to work, he has been a heavy
 "burthen to me in my old age; he has abili-
 "ties sufficient, not only to run through his
 "own share, but the share of all the rest;
 "therefore, I give him ten pounds, and no
 "more. My son Benjamin has run through
 "more than five hundred pounds; therefore,
 "I give him two hundred pounds which I
 "desire may be paid into the hands of Mr.
 "Edward Aldridge, for his use. My son
 "Gad has run through three hundred pounds;
 "and, therefore, I give him three hundred
 "pounds more: the residue of the money
 "arising from such sale I give to be equally
 "divided between my daughter Naomi Bur-
 "rell, my daughter Lois Clark, and my grand-
 "daughter Naomi Wayte, share and share
 "alike. The chapel in Gray's Inn lane afore-
 "said, after my said wife's decease, and her
 "heirs jointly, which they shall have no power

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“to mortgage, nor sell, nor disturb the con-
 “gregation therein; the managers of the
 “chapel shall pay to my son William, and son-
 “in-law James Blake, and their heirs, two
 “hundred pounds per annum. clear of all
 “deductions, except the property tax, as a
 “rent for the same; also my said house which
 “I built in Gray’s Inn lane (after my said
 “wife’s decease) I give to my daughter Na-
 “omi Barrell for her life, and, at her death,
 “to devolve upon her said daughter, Naomi
 “Wayte, and her heirs. The said three
 “ground rents I give to my daughter Lois
 “Clark, to her and her heirs, after the decease
 “of my said wife. And my copyright of my
 “own writings I give and bequeath, jointly,
 “to Mr. Thomas Bensley, and my son-in-law
 “William Clark. This I do, because my son
 “Ebenezer is determined to live without
 “work; and, indeed, I have no doubt but
 “he would sell them into the hands of any
 “man, whereby spurious works in my name
 “might be attached to them, and the world
 “be abused by such publications; to prevent
 “which I have adopted this method, Mr.
 “Bensley being fully able to detect any thing
 “of this sort, he having printed and pub-
 “lished all my works. And I do direct that
 “the whole of the printing and publishing
 “my said works shall be under the manage-
 “ment of the said Thomas Bensley. And I
 “do hereby appoint Sir William Kaye and
 “Sir Ludford Harvey joint executors, they

"having been graciously pleased to express
 "that they will perform the executorship of
 "this my will. As for me I stand executor to
 "no man's will; I am trustee to no place of
 "worship; so that no troubles, from these
 "quarters, can, in any way, fall to my exe-
 "cutors. I give my cook ten pounds, if she
 "is in my service when I die; and my man,
 "Peter Spinthorp, the coachman, the like
 "sum of ten pounds, if in my service when
 "I die. The place of my interment I direct
 "to be at Lewes, in the same vault in which
 "my late valuable friend, the Reverend Mr.
 "Jenkins, was buried. I will that they bury
 "me in the vault that was prepared for me at
 "Lewes; and that they lay me as near as they
 "can to my late friend Mr. Jenkins. Let
 "no pulpit be hung in mourning for me; let
 "no funeral sermon be preached; let no ex-
 "temporary oration be delivered at my grave;
 "let no funeral ode be sung. The Lord Jesus
 "Christ is my exceeding great reward; to
 "this portion nothing can be added, and from
 "this inheritance nothing can be taken away.
 "And I revoke all former wills, by me at any
 "time heretofore made.

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Taken this 30th of June, 1813.

"No. 2. And as I have gone as far as I
 "can in making her life comfortable, I hope
 "that she will do her part towards assisting
 "the indigent of my family.

"No. 3. And, moreover, I give and be-
 "queath unto my said wife, her executors,

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“ administrators, and assigns, the chapel called
 “ Providence Chapel, with the vestry’s yard,
 “ and appurtenances thereunto belonging,
 “ situated in Gray’s Inn lane, in the county
 “ of Middlesex, for the remainder of the term
 “ therein. And it is my request that my
 “ said wife shall settle the said chapel and
 “ premises to and for the use of the congre-
 “ gation of Protestant dissenters assembling
 “ therein, and the minister who shall succeed
 “ me therein, in the same way and man-
 “ ner that I formerly settled the chapel that
 “ was burnt down, in Riding-house lane ; and
 “ it is my wish that the same may be con-
 “ veyed to the following trustees, namely, Mr.
 “ Thomas Bensley, Mr. Christopher Golding,
 “ Mr. John Holland, Mr. Edward Aldridge,
 “ for that purpose ; and I give the profits
 “ arising from the said chapel to my said
 “ wife for her life, she paying thereout two
 “ hundred pounds per annum to Mr. Cham-
 “ berlain, or whoever it be that succeeds me
 “ in the ministry ; and, after my said wife’s
 “ decease, I will and direct that the said trust-
 “ ees shall pay to my son William and my
 “ son-in-law James Blake, and their heirs,
 “ to be equally divided between them, the sum
 “ of two hundred pounds per annum, clear
 “ of all deductions except the property tax,
 “ as a rent for the said chapel, which they
 “ shall have no power to mortgage, nor sell,
 “ nor disturb the congregation therein.”

There was also before the Court a will of the

deceased, dated January 17, 1812, regularly executed and attested by three witnesses. It gave Lady Sanderson her own fortune, left the bulk of the property amongst his grandchildren ; and the rest and residue of it to his daughter Alois Clarke—and, in fine, was in most respects different from the instructions propounded—it disposed also of freehold property.

Swabey for Lady Sanderson.

Burnaby and Phillimore, contra.

JUDGMENT.

SIR JOHN NICHOLL.

There is no sort of difficulty in this case—there is no room for judicial doubt. The propriety of the disposition cannot be taken into consideration—all the requisites of law are complied with :—it is clearly proved that the deceased intended to die testate—he had mentioned this intention several times ; he mentioned it to Mr. Stone his solicitor—he was taken ill ; and, being impressed with an idea that he should not live long, he determined to go to Tunbridge Wells to see Mr. Stone :—he arrived there on the 18th of June ; for several days after his arrival he was so interrupted that he had no opportunity of setting about business. He did not apprehend that he should live long, yet he had no idea that he was so near his death : he sent for Mr. Stone his solicitor on the 27th of June and told him he was determined to set about his will—he does not on the next day, which was Sunday ; but on the following morning he dictated to Mr. Stone great part of the paper propounded—he then said he was tired with so much speaking ; that he had

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done enough for that day, but would proceed on the following morning—he does not do so—but a satisfactory reason is assigned why he did not—on the day after he sent a message to Mr. Stone—who came and read over the paper to him he had written at his dictation—the deceased approved of some parts, and made alterations in others—he dictated also another paper to Mr. Stone for his wife which in some degree accounts for his not having done more for his family. Mr. Stone having received by dictations the contents of this paper, the deceased then suggested something further respecting his chapel; and then added, “*he had now nothing to do that required a thought.*”

On the afternoon of the same day the deceased sent to Mr. Stone again; and asked him “if he had fully understood him as to the chapel being in trust, and the trustees.” Mr. Stone replied, “he understood his intention to be, that he would leave the chapel to Lady Sanderson, with a request to convey it to the four trustees he had mentioned: and adding it was to be on the same trusts as the former chapel, fully explaining the contents of paper three.” The deceased replied, “That is exactly according to my mind, or words to that effect; and added, that is all settled, you will now make it out fair, and bring it to me to sign to-morrow morning.” On the following morning the deceased was seized with a fit, and rendered incapable of signing this instrument, which was all that remained to be done—he was prevented from executing it by the act of God. But having made up his mind; going to Tunbridge Wells for the

express purpose of making his will ; and execution being only prevented in the manner just detailed ; it is as clear a case as ever came before the Court. The execution having been clearly prevented by death the instrument is not rendered less operative for the disposal of this property.

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An application being made for costs, on the part of the next of kin,

Per Curiam.

Let each party pay their own costs.

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Term,
July 6.

NEWELL and KING *v.* WEEKS.

Next of kin held to be barred from calling in a probate from the circumstances of their having been co-nasant of a prior suit, in which the validity of the same will had been contested by other parties.

JUDGMENT.

Sir JOHN NICHOLL.

Thomas Weeks, the executor of the will of Martha Trotman, has been cited by William Newell and Mary King to bring in the probate, and shew cause why it should not be revoked.—Weeks has appeared under protest, alleging various circumstances, and supporting them by affidavits. The proctor for Newell and King has replied to the act, and has also exhibited affidavits.

In ascertaining the facts of the case, the Court will assume the facts alleged by Weeks, and which are not specifically denied to be true. Upon these statements it appears that on the death of the deceased, in December, 1808, no will being found, several next of kin proceeded in this Court to claim the administration. While these proceedings were going on, a will was found dated February 9, 1807. Weeks was the executor—he propounded the will—it was opposed by three persons, John Newell, and Daniel and Maria Wyatt—they were admitted by the executor to be contradictors—several pleas were given in—and about seventy witnesses were examined. The cause came on for hearing in July, 1811, and the Court pronounced for the will—an appeal was carried to the delegates: before proceedings went to sentence there, the appellants

declared they proceeded no further,—the sentence was affirmed in April, 1812; and the cause was remitted,—and on the 24th of April, 1812, Weeks took probate.—In the course of the proceedings the contradictors pleaded that they, *together with William Newell and Mary Newell*, were the only next of kin; so that their interest was not only not denied, but expressly asserted and averred by the other three contradictors. These two persons, however, after all these proceedings, after Weeks had been many months in possession of the probate, under a sentence of this Court, confirmed by the Court of Delegates, call in the probate and require Weeks again to prove the will in solemn form of law—meanwhile Humphreys, the principal witness in the cause, died.

Weeks now alleges that the suit was carried on, though in the name of John Newell and the two Wyatts, yet with the privity of William Newell and Mary King; and that he and Mary Wyatt were not only privy, but had frequent consultations with the solicitors, proctors, and others, concerned in carrying on the same, and were active in procuring information to enable them so to do; and that they thereby became liable to pay a proportion of the costs. In answer to this, what is alleged on the part of Newell and King? Simply that *they were not parties to the suit, and were not cited to see proceedings*—they do not deny that they were privy to the proceedings,—that they were active in procuring information—that they held consultations with the solicitors, proctors, and others.—They make affidavits, confining themselves to the

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same facts: *viz.* “that no appearance was given for them, and that they were not cited.”—Mrs. King indeed makes a further affidavit, “that she was not responsible for, and has not contributed to the costs.” William Newell does not even deny that he has contributed to the costs; so that the facts already stated of their being privy to the proceedings, of their attendance at consultations, and their activity in procuring information, are in no manner denied.—It is further more specifically alleged, “that certain solicitors were employed for the several parties. J. Richardson on behalf of John and William Newell. William Bishop for the Wyatts and for Mary King—that Richardson and Bishop employed Hart as their agent in Gloucestershire, for procuring information; and they both instructed the proctor on behalf of their respective clients, and attended the execution of the commissions for examining witnesses; that they informed themselves from time to time of the progress of the cause, and communicated the same from time to time to their respective clients, particularly to William Newell and Mary King—so that they were as well informed of the merits and circumstances and enabled to protect their interests as effectually as if the cause had been carried on in their names.” All this again is in no matter contradicted—it is further stated, “that, pending the appeal, a proposal was made to Weeks, that if he would advance 100 guineas towards the expences of the opposers, they would give no further opposition to the sentence of the Court below, nor enter any caveat on behalf of the other next of kin—that the

100 guineas were paid, upon the express consideration, as was then understood by all parties, that all opposition on the part of the asserted relations was to cease." An affidavit is made by the managing clerk of the proctor for Weeks, to the same effect.

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This again is not denied either by the proctor, or the parties themselves.

These are the facts: and, upon these facts, the real justice of the case cannot be doubted by any individual. The Court would deeply lament if any rule bound it down so strictly that it must do so great an injustice, as to allow the parties again to put the executor on proof of his will. On what do they stand? they rest simply *on not appearing, and not having been cited to appear*.—If there had been distinct authorities, or a series of adjudged cases, affirming the proposition, that, in all cases where a next of kin had neither appeared nor been cited, he should possess an indefeasible right to put the executors to proof, the Court must have bowed to those authorities: but no authority has been cited to that effect, no case has been produced—no dictum even of any of my predecessors has been referred to—all that has been relied upon is, the practice of *citing parties to see proceedings on pain of their not appearing*—which proves no more than that you may affect them with a legal notice, which may bind them—but the converse of the proposition is by no means established; it does not follow that they may not be bound, or rather may not bind themselves by other means.—The process of citing parties is a convenient one for all

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suitors, because, when that is done, you need not prove actual privity—the law presumes actual privity after the legal process—the *lis pendens* is sufficient notice that persons should appear, and protect their own interests—but if you can prove actual privity, the legal process, in point of solid justice and sound reason, is superfluous; though, *ex abundanti cauteld*, it may still be convenient to resort to it, and have it upon record.

The practice, therefore, may be explained, and accounted for upon other grounds, short of going the length contended for; *viz.*, *that unless either there is an actual appearance, or the party is formally cited, the proceedings will not affect him however distinctly it may appear that he was privy to the whole of them*—indeed, as I have before stated, no authority, case, or even dictum, to support the rule to the extent set up, has been offered to the consideration of the Court.—There are cases, however, the other way, which, though not precisely the same as this, yet shew that the Court looks to substantial justice, and that which right reason requires, and does not require indispensably the strict formality of citing.

There was a case in 1802, (a) *Richardson v.*

1802.
Easter
Term.
May 22.

(a) *Richardson v. Claney.* (Prerog.)

JUDGMENT.

SIR WILLIAM WYNN.

In this case a decree issued on the 28th of January, 1801, citing all persons in general having, or pretending to have, an interest in the effects of the deceased, to appear on the 30th of March, and all succeeding court days, to see the will pronounced by one of the executors, and all other judicial acts, with the usual intimation; which is, that if they did not

Claney, where the Court held that though a party was not strictly bound by proceedings *in pœnam*, yet in justice he could not be allowed to proceed.

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appear, the executor would proceed to establish the will. The decree is not drawn quite in the usual form, but in the fullest possible manner to affect all persons not personally served—it was served, in the only way it could, on the Royal Exchange, it not being known where any relations might be ; and an advertisement was inserted in the public newspapers.

An allegation was given in, and two witnesses were examined upon it—a party appeared as first cousin ; but declared that he would proceed no further. The Court *in pœnam* pronounced for the will on the third session of Michaelmas Term, 1801, and granted probate :—three days after, before it passed the seal, a caveat was entered by the proctor who had appeared before—it was warned ; the same proctor appeared for Thomas Claney, and alleged him to be a nephew, and prayed an answer to his interest, which was assigned, and an affidavit of scripts by both parties. A petition was brought in that the executor might be dismissed, and the probate which had been granted might be delivered to him ; and it was objected that the party, not having appeared till after sentence, could not intervene. The counsel have stated the will, and the proceedings which have taken place—this is not mere suggestion—both parties have joined in it ; and the whole being before the Court, the Court has a right to refer to them. The paper is in the handwriting of the deceased—with this there is annexed to the affidavit of scripts a letter from the deceased to his agent, in which, after stating his affairs, he says he has no relation ; and, therefore, that it was the more necessary that he should make his will—the will was put in an envelope, and addressed to the executors, and endorsed, “ This is my will.” It is objected to the will that there is a clause of attestation, and no witnesses—this is supplied, and the Court thought it supplied, by the testator’s putting the will into a cover, addressing it, endorsing it, and by other circumstances. These circumstances being all in the registry, and on record, as far as this Court

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Another case comes nearer the present, where the Court held that the next of kin being privy to the probate, and acquiescing in the will, was not at liberty to put the executor on proof, even though the will had not been proved *per testes*.—I allude to the case of *Hoffman v. Norris and White*, (b)

can make make them of record, I think I have a right to consider them, and to see what the justice of the case is, and what the party would be likely to obtain; and it does appear to me that there is scarcely any possibility that he could obtain any thing. Besides I must consider how far this person is to be considered as conusant of the proceedings—he is of the same name and family as the other who appeared; he alleged himself to be first cousin; this calls himself nephew. The assignation of the Court on the 11th of January to give a proxy and an affidavit of scripts is in the usual form: none was given; therefore, there was no preparation to proceed with expedition, as there ought to be in such a case. The executor is gone to the East Indies; his answers may be prayed, and then the matter must be hung up for two years. Taking all these circumstances into consideration, and having a just and legal right to consider them, I think this is done only for the purpose of harassing the executor, and perhaps of driving him to a compromise, which this Court will never allow. Under all the circumstances of the case I think myself at liberty to dismiss the party, and to direct the probate to pass the seal immediately.

1805.
Hilary
Term.
Feb. 18.

(b) *Hoffman v. Norris and White*. (Prerog.)

JUDGMENT.

SIR WILLIAM WYNN.

George Hoffman made his will in May, 1791, disposing of real and personal property between a brother and sister, and excluding his brother Lewis Hoffman for reasons mentioned—he died in 1795. In March 1795, the will was proved by the two executors—doubts having arisen respecting the will, a suit in Chancery was brought against the executors, and against Lewis Hoffman, praying an account, &c.—this was answered by all

Prerog. Hilary Term, 1805. This case establishes that it is not necessary, in order to bar a party

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the parties. Lewis Hoffman, in his answers on the 26th of January, 1796, stated that he believed the deceased had made his will as set forth; that the will was duly proved; and he claimed all such right as he was entitled to as brother and next of kin; particularly submitting whether a legacy did not lapse, and that he was so entitled. On the 26th of June, 1796, the master decreed accordingly; and that, by the death of William Hoffman, the legacy had lapsed, and consequently was distributable; and that *one-third of one-half* belonged to Lewis Hoffman—pursuant to this the money was laid out; and Lewis Hoffman received the interest of the one third of the moiety proceeding under the will, as if the legacy had lapsed.

In 1804, a decree was taken out in this Court by Lewis Hoffman against the executor of his brother's executor to bring in the probate, and prove the will. There can be no doubt but that as a brother he is entitled to controvert the will; and, if probate has been obtained in common form, he can call it in, and put the executor on proof. I do not know that there is any specific time which limits a party. The will had been proved in 1795; this decree was taken out in 1804, so that there had been a quiet possession for nine years. I think I know instances in which the Court has allowed the probate to be called in after a longer time, that may be done with cause shewn:—that it may be done under any circumstances is what I cannot admit:—it would be contrary to reason, and every principle of justice. Where the opposing party has been in a situation which rendered it impossible or difficult for him to have proceeded earlier; if he has been absent from the country, a minor, or labouring under imbecility, he may be admitted. But without reason, and where there are such strong reasons as there are here to shew that he was not in such a state of incapacity as to have prevented him, and further that he could not be ignorant of all the circumstances relating to the deceased, from the suit in Chancery soon after the probate was taken out, the case is different. By his answers he admitted

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from proceeding, that he shall actually have been cited here; but that the Court looks to the substantial justice of the case:—the next of kin, though acquainted with the will in that case, and though he had actually averred the validity of it in the Court of Chancery, yet was totally ignorant of the circumstances under which it had been made, or the state of incapacity of the deceased. or other circumstances, rendering the will invalid. There are many cases in which parties have received legacies, and afterwards contested the validity of the wills under which they received them. The suit in Chancery was not one respecting the validity of the will—it was a suit *diverso intuitu*.—The will had not been proved *per testes* at all; and yet the Court held that under the acquiescence of nine years, and without cause shewn, the party was barred from calling upon the executor to prove the will *per testes*; and that, before he could do so, he must explain and account for the delay which had taken place.

both the will and the probate: a decree was made operating on the lapsed legacy; and he acted under that decree, not upon an intestacy, and continued to receive the interest for five years together—not offering to bring up what he has received, but stating only that he had strong reasons to doubt, but did not know that he could call them in question after probate—ignorance of the law is not an excuse; but this is so plain; and, having advice as to the deceased's affairs by the suit in Chancery, I cannot admit this. He speaks of additional facts—but this is mere general assertion—there is little reason to think that a will written with the deceased's own hand in the East Indies, he having lived in this country four or five years afterwards, could be improperly obtained.

I dismiss the suit with costs.

In the present case the deceased has been dead six or seven years—but here a suit has been instituted, the will has been proved *per testes*, and solemn proceedings have been had between competent parties in the same interest, and averring the interest of the parties who now wish to institute proceedings afresh, and the judgment of this Court has been affirmed by that of the Court of *derniere resorte*—Newell and Weeks have not only been privy to all these proceedings; but *substantially* have been parties themselves to this suit, quite as much as if they had actually appeared—Spectators to the whole, and privy to the whole, if they had been dissatisfied, they might have intervened at any moment of the proceeding. This right of intervention, coupled with their privy to the proceedings, is decisive to shew that they can have sustained no prejudice by not having been before cited, and not having before given a formal appearance.—In the former cause they had not only a right, but it was their duty to intervene if they meant not to abide by the decision—their interests were directly affected; if the will had been set aside, they would have established their claim. The *lis pendens* served as a public notice on which they were bound to act. But that which marks, if possible, more strongly the unfairness of the present attempt (though this circumstance is not necessary for the decision of the question) is the agreement made during the appeal, in which it is stated to have been expressly understood, that on the payment of 100 guineas, not only was no opposition to be given to the affirmance of the sentence, but

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Trinity
Term.NEWELL
v.
WEEKS.

1814.

*Trinity**Term.*

}

NEWELL

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WEEKS.

no new caveat was to be entered by any of these parties; and the parties now proceeding do not deny the fact, or their privity to this agreement. It is a most unconscientious attempt again to put the executor on proof of the will.

As to the new facts which are pretended to have been discovered, they are stated too generally, and too indistinctly, to deserve notice; and, even if they had been more distinctly and more circumstantially stated, they would have come too late after the affirmance of the judgment of this Court by the Court of Delegates.

I allow the protest, and dismiss the executor from further proceedings; and I think I am bound to give costs against the other parties.

ARCHES COURT OF CANTERBURY.

SMITH *v.* SMITH. (*a*)1814.
Trinity
Term.
July 4.

JUDGMENT.

Sir JOHN NICHOLL.

Permanent
alimony.
A moiety
given to the
wife.

It is a general rule that permanent alimony shall be larger than that which is allowed during suit.—Even when the bulk of the fortune originally belonged to the husband, the Court allows a competent income to the wife.—She is the injured party, and has a strong claim upon the Court: though with respect to the quantum there is no established proportion of the joint stock:—each case must depend on its own particular circumstances:—no two cases are exactly alike. But there is in this case a circumstance which ought to weigh specially in favour of the wife; *viz.*, that the bulk of the fortune originally belonged to her; and this circumstance is still strengthened by another, namely, that the property was settled on the wife, and that she was induced, by the hope of better treatment, to give it up to her husband. He has been not only adulterous, but cruel—and, in order to

(*a*) *Vide supra.* p. 207.

1814.
Trinity
Term.

SMITH
v.
SMITH.

buy off his cruelty, he obtained possession of the property which had been settled on his wife.

It is a rule of equity that no man shall take advantage of his own wrong—perhaps it would be but just that where the husband violates the matrimonial engagement, and the fortune was originally belonging to the wife that he should give back the whole of it—Courts, however, have not gone that length—yet, in such a case as the present this Court would give as large an allotment as in any.

In Lord Pomfret's case, (*b*) where the fortune came principally by the wife—the income was 12,000*l*. the Court allotted one third to the wife—what weighed there was that the husband was a peer, and that the public had an interest that he should be able adequately to maintain his station.

In *Taylor v. Taylor*, (*c*) where the property was small, the Court gave a moiety.

In *Cooke v. Cooke*, (*d*) the property came by the wife; there also the Court gave a moiety.

In *Otway v. Otway*, (*e*) where the bulk of the fortune came from Mrs. Otway, the Court would have given a moiety, but the husband had six children to maintain; and, on that account, though it gave less than a moiety, still the Court thought it placed the wife on an equal footing with the husband.

In the present case there is but one child:—

(*b*) *The Countess of Pomfret v. The Earl of Pomfret*. Arches May 14, 1796.

(*c*) *Taylor v. Taylor*, Consistory of London, May 28, 1791.

(*d*) *Cooke v. Cooke*, p. 40. (*e*) *Otway v. Otway*, p. 109.

an infant daughter which the husband has taken away forcibly from the wife, and which the Court considers as an aggravation of his misconduct. I shall make no deduction on that account. No doubt the wife will gladly maintain the daughter, if he will allow her to return to her mother.

The joint income is about 2,000*l.*—In addition to the 450*l.* *per annum* allotted to the wife pending suit, I shall allot 550*l.* *per annum*. She will then have 1000*l.*, and he about the same: but as the Court takes the husband's calculation; which may be presumed not unfavourable to himself, in all probability he will have the better half.

1814.
Trinity
Term.

SMITH
v.
SMITH.

FELLOWES falsely STEWART v. STEWART.

1814.
Michaelmas
Term.
Dec. 3.

*Brought by letters of request from the Commissary
 Court of Canterbury.*

Libel plead-
 ing the inser-
 tion of a false
 name in a
 publication
 of banns, ad-
 mitted to
 proof.

WILLIAM STEWART, the son of a gentleman's servant, at Edinburgh, in the year 1811, having raised himself to the rank of a captain, paid his addresses to Jane Fellowes, then resident with her mother, a widow, in Nelson Square, Blackfriars' Road. He described himself to her as the son of a gentleman of considerable landed property, and as presumptive heir to the earldom of Moray; and in fine persuaded her to be married to him without the knowledge, and consequently without the consent, of her mother.

The marriage was solemnized after a publication of banns in the Church of St. Margaret's, Westminster.—On the first Sunday of the publication he was described as *William Douglas Dundas Stewart*. On the second and third Sundays, under *his particular direction*, the name of *Douglas* was omitted; and the banns were published under the names of *William Dundas Stewart*—his only baptismal name was *William*; he was about twenty-eight years of age—and Miss Fellowes was rather more than eighteen.

On the 23rd of July, 1814, the wife instituted a suit to annul this marriage—the libel stated the nature of the fraud which had been practised against her, the want of consent of her mother, and the circumstances under which the publication of banns had taken place.

1814.
Michaelmas
Term.

FELLOWS
v.
STEWART.

Burnaby against the admission of the libel.

This libel is inadmissible on every ground—there is no case in which the assumption of an additional name has been held to vitiate a marriage—nor has it ever been held that the false representation of rank and fortune can affect the validity of a marriage once established.—It is also utterly irrelevant to plead the want of the mother's consent; for by the marriage act publication by banns supersedes the necessity of parental consent.

Swabey and Lushington, in support of the libel.

In the cases of *Tree v. Quin* (a), and *Dobbyn v. Corneck* (b), both turning on the point of the assumption of a false name in the publication of banns, the libels were admitted to proof. In *Frankland v. Nicholson* (c), a marriage was held null for the substitution of a false name for the true one—so also in *Mather v. Ney* (d).

The object of the statute is to give notoriety to the transaction in order that, if any impediment

(a) *Tree v. Quin*, Consistory, Easter Term, 1812, Vide supra, p. 14.

(b) *Dobbyn v. Corneck*, Consistory of London, Hilary Term, Jan. 26, 1813. Vide supra, p. 102.

(c) *Frankland v. Nicholson*, Consistory Court of London, Easter Term, May 29, 1804.

(d) *Mather v. Ney*, Consistory Court of London, Trinity Term, July 10, 1807.

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Michaelmas
Term.
FELLOWS
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STEWART.

exists to the marriage, it may be prevented. Banns which do not establish the identity of the parties must be considered as unduly published. And the identity of a party may be as much concealed by the introduction of a false name, as it may be by the omission of a true one.

JUDGMENT.

Sir JOHN NICHOLL.

Being of opinion generally that this libel is admissible, I shall not now enter fully into the question.

The intention of the publication of banns is to make known that a marriage is about to take place between the individual parties—if, therefore, the publication is such as not to designate, but to conceal, the parties—it is no publication.—This may as well be affected by the insertion of an additional name, as by the omission of one.—Here the insertion is pleaded to have taken place in connexion with fraudulent circumstances. It is, therefore, the publication of banns with an additional name for the purpose of deceiving the party who is a minor—and for the purpose of imposing upon the mother—this, therefore, is directly connected with the great object of the suit: *viz.* the false publication of banns—it is stated to be a publication to deceive on that point which the act of parliament intends should be made known to the whole world.

I am clearly of opinion to admit the libel—reserving my final opinion, till a future stage of the cause.

PREROGATIVE COURT OF CANTERBURY.

1814.
Michaelmas
Term,
 Nov. 5.

JONES v. JONES.

SEVERAL of the next of kin of William Jones of Sudbury, in the county of Suffolk, cited his executors to propound his will in solemn form of law.

A commission to swear witnesses insufficiently executed.

A commission issued to take the affidavits of the executors who resided in and near Sudbury, to the testamentary scripts of the deceased. This commission was in the usual form ; it was addressed to two clergymen ; and it directed that the executors should be sworn in the presence of a notary public. But, there being no notary public resident within ten miles ; the oath had been administered by the commissioners in the presence of two witnesses, instead of a notary public.

Jenner and Lushington for the next of kin.

The directions in the commission are not fulfilled ; consequently, the return is void, and the affidavit no affidavit at all :—the presence of a notary public was essential to the execution of the commission—it may be of importance elsewhere, as an

1814.
Michaelmas
Term.

JONES
v.
JONES.

indictment for perjury would not lie under such an affidavit.

Swabey and Phillimore contra.

There was no notary public resident within ten miles; and it is not an unfrequent practice in the execution of a commission of this description to substitute two witnesses for a notary public.

Per Curiam.

I know how strict the Courts of Common Law are on indictments for perjury. Let a new commission issue, and the executors be resworn.

WETDRILL v. WRIGHT and Others.

1814.
Michaelmas
Term,
Dec. 7.

PETER BLOY of Walsingham, in Norfolk, died some years ago, having first made his will, in which he appointed his wife, Mary Bloy, sole executrix, and left her the residue of his property for life; but after her death appointed his daughter Elizabeth substituted residuary legatee. The widow proved the will in the archdeaconry court, at Norwich, but in no other court; and afterwards died intestate—leaving several nieces and nephews, her next of kin.

The husband of a substituted residuary legatee entitled to an administration in preference to the husband of the sole executrix and residuary legatee for life, both parties being widowers.

William Wetdrill the husband and administrator of Elizabeth, Peter Bloy's daughter, took out a decree against the nephews and nieces of the widow, citing them to shew cause why letters of administration, with the will annexed of Peter Bloy, should not be committed to him:—an appearance was given for the parties cited;—and an act on petition was entered into.

In this act it was alleged, on the behalf of Wetdrill, "That Peter Bloy had died leaving goods, chattels, or credits, in divers dioceses or peculiar jurisdictions, within the province of Canterbury, sufficient to found the jurisdiction of that Court, having made his will in writing, and appointed his wife, Mary Bloy, sole executrix and residuary legatee; that Mary Bloy survived the deceased, obtained probate of the will in the archdeaconry

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Term.

WETDRILL
v.
WRIGHT.

court at Norwich, and, in virtue thereof, paid all the debts and testamentary expences of the deceased, and is since dead intestate without taking upon herself the probate of the will in this Court. And it was further alleged that Peter Bloy by his will directed his wife to leave off business at the Michaelmas after his death; and that all his monies should be put out to interest to Henry Lee Warren, and the interest thereof be paid to his said wife for her life; and after her death he directed the principal to be paid to his daughter, Elizabeth Wright, afterwards Elizabeth Wetdrill; that the deceased in her life-time sold divers goods and effects, and himself placed the monies arising from such sale in the hands of Henry Lee Warren, and Mary Bloy received the interest of this money as long as she lived; and that upon her death the said Elizabeth Wetdrill became absolutely entitled under the will to the principal monies; and that Wetdrill, as her legal representative, is now entitled to the same; and that the monies now due, principal and interest, amount to 895*l.* 0*s.* 9*d.*, which is the whole of Peter Bloy's property now to be administered."

*On the behalf of the nephews and nieces of Mary Bloy it was alleged, in opposition to this statement, "That Mary Bloy survived Elizabeth Wetdrill; and that the sum of 895*l.* 0*s.* 9*d.* above-mentioned not having been reduced into the possession of Elizabeth Wetdrill during her lifetime, or into that of her husband William Wetdrill, doubts have arisen to whom the 895*l.* 0*s.* 9*d.* belongs, which question ought to be determined be-*

fore administration is granted as prayed by the adverse party—that this Court is not of competent jurisdiction to determine the same—that Mary Bloy hath left behind her divers goods and chattels; and that the parties in this cause are her nieces and two of her next of kin, and are ready and willing to take upon themselves letters of administration of her goods, chattels, and credits, and also letters of administration, with the will annexed, of the goods, &c. of Peter Bloy, and to distribute the effects of Mary Bloy and Peter Bloy according to law. Wherefore they prayed for letters of administration to them as next of kin to Mary Bloy, sole executrix and residuary legatee named in the will of the deceased according to the usual course and practice of the Court.”

In reply to this it was stated, “That besides the 895*l.* 0*s.* 9*d.*, the property of Peter Bloy in the hands of Henry Lee Warner, there is a further sum of 200*l.*, part also of the property of Peter Bloy, to which William Wetdrill is also entitled, in the hands of Robert Sillet, the husband of one of the parties in this cause, secured by his bond, dated October 6, 1803, and interest on the bond for April 6, 1813, which sum is part of the monies placed at interest to Henry Lee Warner, pursuant to the will of Peter Bloy, to the interest of which Mary Bloy was entitled for her life, and after her decease the principal was to be paid to Elizabeth Wetdrill; which sum was, in October, 1803, taken by William Wetdrill out of the hands of Henry Lee Warner, lent to Robert Sillet; and Robert Sillet paid interest to William Wetdrill

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Term.

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thereon for the use of Mary Bloy as long as she lived, and after her death to his use till the 6th of April, 1813. When Robert Sillet taking advantage of his having himself inserted the name of Mary Bloy as the obligee of the bond, though he well knew she had only a life interest in the money, refused to pay any further interest thereon." And moreover it was denied "that any legal doubts had arisen as to the title of William Wetdrill to the administration, because Elizabeth Wetdrill survived Peter Bloy; and, immediately on his death, the bequest became absolutely vested in him; and it was alleged "that if administration, with the will annexed, should be granted to the adverse parties, several difficulties would arise in the recovery of the 200*l.* and interest secured by the afore mentioned bond."

Swabey for William Wetdrill.

Phillimore contra.

This is a question between the representative of the residuary legatee, and the representative of the next of kin—in such a case the former is always preferred. Comyn's Dig. Administration (B. C.) Sparke v. Denne, Jones 225. (a)

(a) The case between Sparke and Thomas Denne of the Inner Temple on an appeal to the Delegates was thus:—John Denne made his will, and by it devised several legacies in money to several persons; and in fine devised the residue "*of all my moveable goods and chattels*" to his wife, and made his wife executrix, and having divers debts due on bond, died; and his wife, before taking out probate of the will, to wit on the same day, died also.—After her death administration of the goods, with the will annexed, was given to the sister of the

JUDGMENT.

SIR JOHN NICHOLL.

This question arises upon the grant of an administration of the goods of John Bloy left unadministered by his executrix.

The deceased left a widow and a daughter; he bequeathed his property to his wife, she paying to the daughter a certain sum, and after her death the whole to go to the daughter. The wife was executrix, and took probate of the will at Norwich. The daughter survived her father, and married; but died before the widow. The widow is now dead. Administration *de bonis* is prayed on one side by the administrator of the widow; on the

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Term.

WETDRILL
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WRIGHT.

wife, who had married Sparke; and against this an appeal was brought by Thomas Denne, the brother of the said John Denne. The commissioners' delegates, at the sentence given in the cause, were, the bishop of Ely, Jones, Whitlock, Harvey, and Croke, justices, and there were no others there; and it was after several arguments of Drs. Eden, Duck, Crawley, Bramston, and Noy, that the sentence was, that the said administration should be revoked, and a new administration granted to Denne with the aforesaid will annexed; and the reason was, that by the devise of "*all my moveable goods and chattels*" debts which are *jura* were not devised; so that, in fact, there was nothing that was devised. Therefore, the administration was committed to the nearest of the friends of John Denne: but if all the goods, chattels, and debts had been devised, and no residue, then the administration belonged to the devisee, for he had all the estate, according to 22 Eliz. Dyer. And, upon this difference, the first administration was reversed, and the new administration granted; and it was *und voce* by the said commissioners, and they decreed that an obligation should be taken from Thomas Denne that he would pay all the legacies and perform the aforesaid will, &c. William Jones 225. (Anno. 6th Car.)

1814.
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other side by the husband of the daughter. It is admitted, and clear, that this is not a case within the statute;—the grant is in the discretion of the Court. The general principle, both by the statute and practice, is to give the management of the property to the person who has the beneficial interest in it; it is not always granted to the majority of interests: but when one party has an interest, and another no interest whatever, in that case the Court will place the property in the hands of the person who has the exclusive interest. Here the only property left unadministered is that in which the widow had clearly only a life interest; whether she had more in any part of the property must depend upon the construction of the will, which the Court, under these circumstances, will not go into. Being a vested interest in the daughter, and she having married, and her husband having survived her, he has the same right that she would have had.

Wetdrill then having the sole interest, and the others having no interest at all, I shall grant the administration to him; and I do not apprehend that, in so doing, I am departing from the ancient practice: the question is not between the residuary legatee, and the next of kin, as has been attempted to be maintained in argument; but between the representative of a person who had a life interest, and the representative of a person who had a substituted interest.

I shall grant it to the representative of the substituted interest.

HARRISON and others v. All Persons in General.

1815.
Hilary
Term,
Feb. 8.

Per Curiam.

The Court does sometimes grant to more creditors than one ; but it prefers that one should be fixed upon.

For the credit of the Court I trust that improper contrivances will not be resorted to for the purpose of preventing the just administration of the estate : I must, therefore, intimate to practitioners, that to follow all instructions they receive from their clients may not be creditable. The proceeding here is extraordinary—an appearance has been given for this party to pray an administration with the will annexed—the will now is brought in, and the same party appears under a protest. If he appears under a protest, I must hear him ; but I must look to practitioners to satisfy themselves as to the grounds of the steps which they take.

Hilary
Term.
Feb. 17.

CUNNINGHAM v. SEYMOUR.

Disputed wills
ought to be
lodged in the
registry of
the Court for
safe custody.

Per Curiam.

Practitioners have no right to keep wills in their possession.—I have, in several instances, stated that the expense necessary to get a will out of the hands of a party must fall upon those who withhold it. The proper way is for the will to be brought into the registry for safe custody. Wherever a compulsory process is necessary for this purpose, the expense shall fall on the party occasioning it.

SHERARD and CLARE v. SHERARD.

1815.
Hilary
Term.
Feb. 19.

THE Reverend Philip Castel Sherard of Godmanchester, in the county of Huntingdon, died on the 29th of November, 1814. By his will, dated the 24th of August, 1809, he made the following appointment of executors :—

Of the appointment of an executor, held not to be revoked by necessary implication.

“ I nominate and appoint my three brothers
“ George Sherard, Robert Sherard, and Caryl Sherard, joint executors of this my will ;
“ and I hereby give and bequeath to them,
“ my said trustees and executors, the sum of
“ 1000*l.* in case they shall take upon themselves the trusts hereby reposed in them.”

By a codicil of the 30th of August, 1809, written by himself on the back of the last sheet of the will, he thus alters the appointment of his executors :—

“ I hereby revoke the appointment of my
“ brother, Robert Sherard, to be an executor
“ and trustee, in the above written will ; and
“ appoint in his stead, my wife, Sarah Haughton Sherard, with all the powers he would
“ have had ; and my will is, that of the 1000*l.*
“ bequeathed to George Sherard, Robert Sherard, and Caryl Sherard, as executors
“ and trustees to this my will, that he, Robert Sherard, receive 103*l.* only, and that the
“ rest be divided between George Sherard and

1815.
Hilary
Term.
 {
 SHERARD
 v.
 SHERARD.

“Caryer Sherard for their trouble in seeing
 “my will executed,”

By a second codicil, dated December 5, 1812,
 in his own hand-writing, on a separate sheet of
 paper, he made a further alteration: *viz.*

“I, Philip Castel Sherard, of Upper Harley
 “Street, made a will some time ago, in which
 “I appointed my brothers George Sherard,
 “Robert Sherard, and Caryer Sherard, trus-
 “tees and executors, for the purpose of car-
 “rying that my will into execution. I do now
 “appoint my friend Sir Simon Haughton
 “Clarke, Baronet, a trustee and executor for
 “the purpose of carrying my said will into
 “execution, instead of my two brothers Ro-
 “bert Sherard and Caryer Sherard, as he is
 “more conversant with my affairs than they
 “are: and I invest him with all the powers
 “and rights which I had, in the before men-
 “tioned will, invested Robert Sherard and
 “Caryer Sherard with, for the purpose of
 “executing my will. And my intention is
 “that my brother George should remain
 “trustee and executor, and that Sir Simon
 “Haughton Clarke be joined with him only;
 “and I hereby revoke the appointment of
 “Robert Sherard and Caryer Sherard as
 “trustees and executors, but wish all the
 “rest of my will to be put in execution, and
 “be considered as my last will and testament.”

The question before the Court was, whether
 the widow was to be considered as an executrix;
 and, consequently, whether probate was to be

decreed to her as well as to the Reverend George Sherard and Sir Simon Haughton Clarke, Bart.

Swabey and Phillimore for the Reverend G. Sherard and Sir S. H. Clarke.

1815.
Hilary
Term.
SHERARD
v.
SHERARD.

The last codicil must be held to be a virtual revocation of the appointment of Mrs. Sherard to the executorship. It is clear from the context that the testator intended to confide the management of his property to no other person but the two executors named in that instrument: the words "*and my intention is that my brother George should remain trustee and executor, and Sir Simon Haughton Clarke be joined with him only,*" can only be interpreted as revoking, by necessary implication, as well the executors named, as the executrix not named, in the former testamentary papers.

Lushington and Cresswell contra.

It is necessary that the contradiction should be direct to effect a revocation: under the first codicil the appointment of the widow is clear—an executorship is a beneficial office, and is so considered in law. If there be such a contradiction that the whole cannot subsist together, then the latter part may destroy the former; but if it be only doubtful, then that construction must be adopted which will give effect to the whole. *Ridout v. Pain* (a), *Ulrick v. Lichfield*, (b) *Swinburne*, p. 1026. The taking away a beneficial right is odious; there cannot be a revocation of an executor by implication.

(a) *Ridout v. Pain*, 3 Atkins 485.

(b) *Ulrick v. Litchfield*, 2 Atk. 373.

1815.
Hilary
Term.
 }
 SHERARD
 v.
 SHERARD.

Words only are relied upon—there is nothing to induce the Court to suppose that Mrs. Sherard was in his contemplation when he wrote the last codicil; such an interpretation has the most just and natural reference to the subject matter—the word *only* is used with reference to the other brothers—if he had intended to have revoked a former appointment, he would have done it in a plain manner; if he had forgotten that he had appointed his wife, he cannot be held to have revoked that which he did not remember.

JUDGMENT.

Sir JOHN NICHOLL.

The testator, the Reverend Philip Castel Sherard, appointed his three brothers executors in his will; a week afterwards he made a codicil in which he revoked the appointment of his brother Robert, and substituted his wife in his stead: this codicil is solemn and formal; he signed it; and it is attested by three witnesses. On December 5, 1812; Sir Simon Clarke was substituted as executor for two brothers of the deceased; and it is said that he shall be joined with his brother George only. The question is, whether by this codicil the appointment of Mrs. Sherard is revoked also? She is expressly appointed by a very formal instrument; the revocation, therefore, must be either express or by necessary implication. It is not express—because there is no mention of it—it is, therefore, reduced to the consideration of whether it is revoked by necessary implication.—Taking the whole of the words together, it does not appear to me that it is. The testator recites only his will, (he does not

refer to the codicil by which he had appointed his wife) and continues, "*I do now appoint my friend Sir Simon Haughton Clarke, Bart. a trustee and executor for the purpose of carrying my said will into execution, instead of my two brothers Robert Sherard and Caryer Sherard; as he is more conversant with my affairs than they are; and I invest him with all the powers and receipts which I had in the before mentioned will invested Robert Sherard and Caryer Sherard with, for the purpose of executing my will, and my intention is, that my brother George should remain trustee and executor, and that Sir Simon Haughton Clarke should be joined with him only; and I hereby revoke the appointment of Robert Sherard and Caryer Sherard as trustees and executors; but wish all the rest of my will to be put in execution, and to be considered as my last will and testament.*"

He substitutes this gentleman instead of his brothers—if the word *only* was not inserted, there could be no possible doubt; but it does not seem to me that the word *only* revokes the appointment of his wife. The Court must endeavour to give effect to every word if possible; *only* one brother is left executor out of three—the word *only* seems to refer to this—such construction is fortified by what follows—if he had meant to have revoked his wife also, he would have so stated it in this part—when he expressly revokes the appointment of his brothers, and confirms the rest of his will, he confirms the appointment of his wife.

1815.
Hilary
Term.

SHERARD
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1815.
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Term.
SHERARD
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SHERARD.

It has been conjectured that he had forgotten the second codicil in which he substituted his wife for his brother—he might have had no access to his will, on which that codicil was endorsed, at the time of making his second codicil—and this is possible from the expression “*sometime ago*.” If he did not recollect the appointment of his wife, it is clear he did not mean to revoke it.

Supposing that he did recollect her, it is most extraordinary that he did not expressly revoke the appointment if he wished it not to stand—the presumption in that case must be, that he intended to have three executors.—On the whole, there being no revocation of the appointment, either by express words, or, as it appears to me, by necessary implication, I am of opinion that Mrs. Sherard ought to be joined in the probate with the other two executors.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

Doctors' Commons;

AND IN THE

HIGH COURT OF DELEGATES.

ARCHES COURT OF CANTERBURY.

FELLOWES, falsely called STEWART, v. STEWART.(a)

1815.
Hilary
Term,
Feb. 23.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit promoted by Jane Fellowes against William Stewart to annul a marriage had on the 30th of October, 1811, by reason of a fraudulent and undue publication of banns.

The party applying for the sentence of nullity was, at the time of the marriage, a minor of the age of 18—her father was dead—her mother con-

A marriage
annulled on
account of
the insertion
of a false
name in the
publication
of banns.

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tinued unmarried, and the marriage was had without her consent—this, though it would not be a sufficient ground to set aside the marriage if the banns were duly published, is an ingredient in the case not improperly introduced to the notice of the Court as tending to shew fraud in the transaction.

The first publication was by the names of William *Douglas Dundas* Stewart; the two subsequent publications by the names of William *Dundas* Stewart only. It is alleged that this was a publication by false names through fraud:—the publication must be in the true names of the parties;—where the true names are not used, it is no notice at all to other parties;—even either of the parties themselves may have an interest in the true names being used,—the true names are, therefore, required. What are the true names may be matter of difficulty;—it may be a question whether a name gained by repute may not be fairly used;—but there is no such difficulty in the present case. What would be the effect of a slight variation, from error or accident, has perhaps not been settled by any direct decision;—perhaps it would not vitiate the publication. In the present case the names were never assumed before; but were adopted to assist in practising a fraud against the other party.

This person was not a boy when his acquaintance commenced with Miss Fellowes,—he was twenty-seven or twenty-eight years old; she was only sixteen or seventeen. It is proved that he was never known by any name but that of William Stewart—he asserted himself, upon this acquaintance, to be the presumptive heir of the Earl of Moray, and

the son of a man of large landed property in Scotland;—whereas it is proved by the evidence of Lord Moray that there was no truth whatever in this representation :—the fact turns out to be that he was the son of a man who kept a sort of vintner's cellar, where tobacco was sold, in some part of Edinburgh :—his false representations were made in the presence of Miss Fellowes and her mother ; and, in order to support the deception, he had the arms of the Moray family engraven on his seal—by these artifices, though the mother expressed her aversion to him in strong terms, he prevailed on this young woman to marry him, she being, as it appears from the evidence, rather captivated by the hope of a coronet.

Miss Jones proves that he desired her to have the banns published by the names of William *Douglas Dundas Stewart*, and that they were actually so published ;—she says that, to prevent mistakes, she, two or three times, asked him if the names were right, and he assured her that they were ; and that this conversation passed when he was walking with her and Miss Fellowes. Miss Jones returned home shortly afterwards, and reduced the names into writing :—previous to the second publication he called himself at the vestry room, and had the name of *Douglas* struck out—but for what reason does not appear : and on the second and third Sunday he had the banns published in the names of William *Dundas Stewart*.

What would be the case if this were mere error the Court is not called upon to enquire,—it would be very reluctant to vitiate the marriage :—

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the insertion of a name may mislead as well as the omission of a name;—here it must have been done for some purpose of deception, to give colour to his former fraud;—it might tend fraudulently to confirm the idea of the connexion he had before set up. The publication was not in the true names,—suppose any one present at the publication who knew William Stewart, the vintner's son—would he know William *Dundas* Stewart? Certainly not. It is not necessary to prove that any person was actually deceived;—it is sufficient if any person might have been deceived;—*non constat* that this very circumstance might not lull to rest all other enquiries—might not Miss Jones have been deceived by it? Suppose enquiries made of Still (a witness to whom his brother had been apprentice, and who had known him from his boyhood,) who only knew him by the name of William, his answer would be, that it was not the same person;—the introduction of names of this sort might mislead; and it is obvious the party intended to commit fraud.

Upon the whole I am of opinion that this publication was not in the true names, and that it was a fraudulent publication; as such I pronounce the marriage to be a nullity.

*Swabey* prayed costs.

The Court having questioned the registrar as to the practice of giving costs, in cases of this description, said, I think, under the circumstances of this case, I am bound to give costs.

*Costs* given.

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## PREROGATIVE COURT OF CANTERBURY.

TAYLOR and Others v. DIPLOCK.

1815.  
*Easter*  
*Term,*  
*April 12.*

**JOB TAYLOR**, a staff-serjeant in the corps of royal artillery drivers, on his return from Portugal in the Queen transport was, on the 14th of January, 1814, wrecked in Falmouth harbour, and drowned; his wife, who was also on board the transport, perished by the same calamity.

A husband appoints his wife executrix and residuary legatee; he and his wife are drowned at the same time; administration with the will annexed granted to the next of kin of the husband.

Job Taylor left a will, in which, after bequeathing several small legacies amongst his relations, he had constituted his wife sole executrix and residuary legatee:—his property amounted to 4000*l*. A question arose whether the relations of the husband or the relations of the wife were entitled to this residue. James and Richard Taylor, the brothers, and Eleanor Baillie the sister of the husband on one side, and Sarah Diplock, mother of the wife, on the other, respectively prayed administration with the will annexed to be granted to them; and Sarah Diplock prayed also in the alternative, that if not granted to her, administration with the will annexed should be granted to John France, her nominee, limited to attend certain proceedings to be had in the Court of Chancery.

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The facts of the case were detailed in an act on petition, in support of which several affidavits were produced on both sides.

On behalf of the relations of the husband,

*Jeremiah Barham, Joseph Minshull and John Daniells*, (three privates of the corps of royal artillery drivers, who were aboard the Queen transport when she was wrecked,) made oath "That the Queen transport ship arrived at Fal-  
"mouth, on or about the seventh day of the  
"month of January, and remained there until the  
"fourteenth day of the same month; early in the  
"morning of which day a heavy gale of wind  
"arose, and the said ship struck upon a rock,  
"when these deponents who had been asleep be-  
"low, went up upon the deck; and this deponent,  
"the said Jeremiah Barham, for himself saith,  
"that he was one of the first persons who so  
"came upon deck, and soon after saw the said  
"Job Taylor and Lucy Taylor his wife come  
"up together upon deck, the said Job Taylor  
"having a plaid cloak upon his arm: That the  
"said Job Taylor soon after went down into the  
"cabin, and returned on deck with another plaid  
"cloak, which he threw over the said Lucy Tay-  
"lor, who before had but little clothing on her:  
"and all these deponents make oath that they saw  
"the said Job Taylor and Lucy Taylor together  
"upon the quarter deck of the ship some time  
"after she struck upon the rock; and these depo-  
"nents, the said Jeremiah Barham and John  
"Daniells, heard the said Job Taylor offer a large  
"sum of money to any person who would get



“ his wife on shore ; and in about ten minutes  
 “ or a quarter of an hour after the ship parted  
 “ in the middle and filled with water, and many  
 “ persons were then lost : but these deponents  
 “ being engaged in seeking their own preservation,  
 “ cannot say whether the said Job Taylor and  
 “ Lucy Taylor were among the persons who were  
 “ then lost, but have heard they were both drowned,  
 “ with many others in the said ship.”

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Robert Howarth, serjeant, and John Ratcliffe, and Patrick Mulrannan, (drivers in the corps of royal artillery,) deposed “ that they heard Taylor
 “ offer 2000*l.* to any one who would save his wife,
 “ but as no one made the attempt he went down
 “ into the cabin himself ;—that Lucy Taylor was of
 “ a timid disposition, and probably so terrified that
 “ she died before her husband could get near her.”

On behalf of Mrs. Diplock, (the mother of the wife,)

John Dicker, lieutenant in the royal artillery, deposed, “ That Lucy Taylor was apparently of
 “ a strong robust constitution, in good health and
 “ very active ; and that Job Taylor was rendered
 “ unfit for active service by a severe asthma, which
 “ frequently afflicted him to a severe degree.”

James Roe, a private in the Artillery, swore to the same effect, and “ that Job Taylor, after
 “ having been on deck, went again into the said
 “ cabin by which time the said vessel began to
 “ fill with water very rapidly which this depo-
 “ nent could ascertain from the circumstance of
 “ the provisions laid in for the crew and passen-
 “ gers of the said vessel which were stowed in

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" the bottom of the said vessel being driven by the
" violence of the water up the gangway of the
" vessel; and, thereupon, immediately and whilst
" the said Job Taylor remained below, in the
" cabin, the vessel went in pieces, when this de-
" ponent, and the several persons near him, re-
" mained on the wrecks; and in about a quarter of
" an hour afterwards, he, this deponent, saw that
" part of the said vessel *wherein was the said Job*
" *Taylor and the said Lucy Taylor, fall into the*
" *water.* And this deponent further saith, that
" he, this deponent was washed on shore upon the
" wreck of the said vessel, with about one hundred
" and one other persons; but that all the rest were
" drowned; and amongst those so drowned were
" the said Job Taylor, and Lucy Taylor, in man-
" ner aforesaid.

Jemmer and Phillimore, for the next of kin of the husband.

The burthen is thrown on the adverse party to shew that there ever was a moment in which the property vested in the wife. The presumptions of law and fact are unfavourable to such a conclusion—in the absence of evidence a natural presumption arises from the very texture and constitution of the human frame; the delicate frame of the one is less calculated to withstand the shock and buffet of the waves than the more hardy and robust frame of the other: according also to general probabilities a female is naturally timid and less likely to be possessed of presence of mind in instant and unforeseen danger than a man, especially one whose occupation it had been to face danger and death in

every shape: this is no fanciful theory, it has found its way into that code of laws which had its foundation deep in the knowledge of human nature. In cases of this description the Roman law invariably founds its presumptions on the relative strength arising from the probabilities of age or strength of the two persons. "*Si (a) maritus et uxor simul perierint, stipulatio de dote capitulo 'si in matrimonio mulier decepisset' habebit locum, si non probatur illa superstes viro fuisse:*" and again, "*Cum (b) pubere filio mater naufragio perit, cum explorari non possit uter prior extinctus sit—humanius est credere filium diutius vixisse.*"

The evidence here fortifies the presumption of law. There is no circumstance from which any fair inference can be extracted that the wife survived. The husband's possession of the property is certain, there is no proof that the wife ever possessed it:—our claim is founded on a known fact, theirs on an unknown fact;—ours on an apparent, theirs on a non-apparent right:—they have not satisfied the obligation imposed upon them, and shewn themselves the representatives of a person who ever possessed the property.

Adams and Dodson, contra.

The rules of the civil law were founded on the time of life, and the strength of body, most likely

(a) Digest, lib. 34. t. 9. s. 3. De Commerientibus.

(b) Dig. lib. 34. t. 22. but if the son was under the age of puberty the presumption was inverted on the ground that the full grown woman was the more robust of the two. *Si mulier cum filio inpubere naufragio perit, priorem filium necatum esse intelligitur.* Dig. lib. 34. tit. 5. 23.

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to encounter difficulty—they have no application here—the sex of the party was one circumstance ; but, in the present case, the person of the weaker sex is proved to have been the strongest of the two. She was of a strong hale constitution, whereas her husband was an invalided soldier ; the probabilities are strong that she was the survivor. Gen. Stanwix's case and *Wright v. Netherwood* (c) are in opposition to the doctrine laid down by the other side.

(c) This case, more generally known in our courts under the denomination of *Wright v. Sarmuda*, (Prerog. Easter Term, May 6, 1793.) is reported in the notes of Evans's edition of Salkeld, 2 Salk. 593. Being in possession, however, of a very full note both of the argument and judgment, taken by one of the advocates who were present, and on whose accuracy great reliance may be placed, I have given it insertion here ; and that the more readily, as the nature of the case and the ground of the decision have been frequently misapprehended.

Sir William Scott, counsel for Sarmuda.

This is a cause brought by the next of kin against the executor of George Netherwood to obtain the judgment of the Court on a testamentary paper, under circumstances set forth in an allegation and the answers.

George Netherwood married Elizabeth Lomax, on the 24th of June, 1783. On the 8th of Oct. he made a will charging his real estate with the payment of his debts and legacies if the personalty should be insufficient, giving some pecuniary and specific legacies, and leaving the residue to his wife by her former name of Elizabeth Lomax, spinster ; he bequeathed to her also his real estate for her life—and appointed Sarmuda his executor in England, and other persons executors for his property in the West Indies.—He had several children : on the 12th of March, 1789, his wife died, leaving three children by him. In Nov. 1789, he married Ann Lomax, the sister of his first wife ; and had issue by her, one son, born and baptized in Jamaica. In July 1791,

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This case is under singular circumstances ; it

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George Netherwood, his wife, and her son, and all his children by his first wife, embarked for England in a vessel which has not been heard of since, but is supposed to have foundered at sea, and they all perished. Probate of the will was granted to Sarmuda the executor, who is now called upon to prove it in solemn form of law, or to shew cause why the probate should not be revoked, and administration granted to the next of kin of the deceased as having died intestate. The facts stated in the allegation are admitted in the answers on which the cause now comes on. The property, by the inventory, appears to be about 8000*l.* ; the legacies, given by the will, amount to 288*l.* only. Under the circumstances stated we submit that the will is not revoked :—the validity of the second marriage cannot now be questioned ;—undoubtedly, by the general principles of the law, marriage, and the birth of a child, is the revocation of a will ;—on the ground that it is such an alteration of circumstances, that it is not to be presumed the testator adhered to a will made before it occurred ;—but it is a presumptive revocation, and may be repelled by circumstances,—if it is shewn to be the intention of the deceased that it should operate, it stands notwithstanding : therefore, these cases are always open to the evidence of circumstances. There being a second marriage is of consequence, for when a married man makes his will, the wife dies, and he marries again,—in case of such man having a family, there is not such a total change of circumstances as in the case of a bachelor.

Thompson *v.* Shephard, in Ambler.—Myall *v.* Duffield, before Dr. Calvert.

Per Curiam.

Those were cases entirely of circumstances.

Sir William Scott.—But this is one also—Great part of this will could not operate, the residue being given to the wife, and the legacies being but small : as it would dispose only of a small part of the property, it would not raise the presump-

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arises upon the grant of an administration, with the will annexed of Job Taylor :—and the question is, whether the administration is to be granted to

tion which would arise on the disposition of the whole or a large portion of the property. *Gray v. Altham*, Cockpit, 1752.

He could not be insensible of the existence of the will ;—it must be presumed he knew its operation—small bequests only ; the bulk of his fortune is subject to the statute, and would be a provision for his wife and family.

Per Curiam.

What do you say to the time of the death of the deceased and his children ? it would make a difference, in case of intestacy as to the persons interested.

Sir William Scott.—It would make a difference only as to the persons to be bound by the sentence, and they may take the judgment of the Court on the will.

Per Curiam,

How was the case of General Stanwix determined ?

Sir William Scott.—It was compromised at the recommendation of Lord Mansfield, who said there was no legal principle on which he could decide it.

Per Curiam.

But how do you mean to proceed ? the parties here are the next of kin of the deceased on the one side, and the executor on the other.

Sir William Scott.—They must resort to the Court of Chancery for directions in either case—the question is, only whether Sarmuda is to act as executor, and to pay the legacies.

Dr Nicholl on the same side with Sir William Scott.

All presumptive revocations are *stricti juris*—the circumstances to revoke must be such as are totally inconsistent with the idea of the intention that the will should stand : generally marriage and the birth of a child is a revocation, because the situation is so changed ; all the duties and relations are altered, —it is laid down in all the cases, there must be a total alteration of circumstances.—If it would not make a material change of circumstances or disposition, which the deceased would pre-

the next of kin of the testator, or to the next of kin of the residuary legatee.

The mother of the residuary legatee had originally make, then the presumptions are repelled,—here he clearly intended to take so much as is left by legacy from his wife and children.—The disposition is nearly the same as the will made.

Per Curiam.

Do you mean to argue the question the same as if the child had survived? might not the will revive?

Dr. Nicholl.—It might,—but I must argue it so;—there is no fact on which to argue which survived; the father might be presumed to do so as the stronger, the child as the younger. There have been cases in which the presumption has not been held to take place, because there has been no such change as to induce it.—*Brown v. Thompson*, 1 Eq. Abr. 312. *Cubitt v. Brady*, *Calder v. Calder*, Prerog. Jan. 1793,—this last was different in its circumstances,—the will was wholly inconsistent with the relation of father and husband,—he left the bulk of his fortune to his brother,—there were declarations to support the presumptions,—the residue was small, the will would involve the family in great litigation, all the circumstances tended to support the presumptions.—The effect here will be only to give the legacies which the deceased meant to give from his wife and children:—to put his estate in the management of that person to whom he meant to give it, when he was a married man with children; then there is such alteration of circumstances as induces the presumption.

Per Curiam.

The case of revival has not been considered; suppose a man makes a will, and marries, and has children,—the wife and children die,—how does the case stand? In the Roman law the *agnatio sui heredis* revoked a will,—but the death of such heir revived it.—These cases are professed to have gone on the ground of the Roman law.—I desire the counsel to consider this point against the next court.

Sir WILLIAM SCOTT.

According to the Roman law *agnatione posthumi vel quasi* May 13.

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nally made a different prayer, viz. that this court should grant an administration for the purpose of substantiating proceedings in the Court of Chan-

posthumi rumpitur testamentum—on the death of the child the will revived if *quasi posthumus* only, that is, though not strictly by the civil law, yet *dabatur possessio secundum tabulas* by the Prætorian law, as by a new designation of the will of the father;—on the death of the real posthumous it did not; there the presumption could only be after the death of the testator; Voet ad Dig. 28.—On the principles of the Roman law, the father must be supposed to survive, and the child to have died first.

Dr. Nicholl.

All perished in the same ship;—the inference of common sense is, that the husband survived the others, the child being only an infant of a year old.—This was the presumption of the civil law. D. 34. 5. 22 and 23. Voet in loc. D. 23. 4. 26. Domat. in loc. Then the presumption being that the father and husband survived, the question is, whether his will is revoked?—there is no case where it has been held revoked in the law of England,—the law looks to the time of making,—of consummation, it was good at the time of making.—A presumptive revocation by the law of England, is not so strong as the *ruptio testamenti* by the civil law. There it was completely a destruction, here it is only a presumption, which may be rebutted by any evidence. Being only a presumption, we must suppose the party departed from the intention,—the removal of those causes would as completely revive it, and in a stronger manner; for it is confirmed by the act of the testator, at least negatively in not destroying it. By the Prætorian civil law the will revived on the death of the *quasi posthumus*; on the presumption of intention, the party not having destroyed it. D. 28. 3. 1. Domat. 3. 1. 5.

Dr. Battine, *contra*.

An exception to the general rule of *revocation* in the case of a widow has been stated; but I do not know the case stated;—the will is as much revoked by marriage and the birth of a child, as if it had not been made;—it could not be the intention that it should exist in the change of circumstances, after the birth of

cery, and suspend its own proceedings till the Court of Chancery had decided the point:—The Court would have been glad to have devolved its functions

many children ; less so, when the party had contracted a marriage a second time.—It has been compared to the case of a posthumous child, who not being provided for, would not affect a will ;—but that is only a partial change. We allow the general rule of the civil law, as to the survival of the father ; there is no admission of the fact here that the child died first, there is no proof of it ; they all died by shipwreck,—*agnatio posthumi, vel quasi agnatio posthumi*, destroyed the will. D. 28. 3. 2. D. 28. 3. 12. Legatees are let in merely on account of the presumption in favour of the *hæres scriptus* for whom the intention of the testator is to be presumed.—The general presumption is, that a will is set aside by marriage and the birth of a child. The rule of the civil law is, that though the child die the will would not revive.

Dr. Swabey on the same side with Dr. Battine.

It appears by the inventory that the estate is worth about 8000*l.* ; the freehold, as far as we can guess from the arrears due, is 27*l.* per annum only—the will is executed in duplicate.—Whether a question may arise hereafter, to whom the administration is due, on the question of survivorship, stands clear of the present question. The civil law has been accurately stated on the other side. *Zouch qu. 3.* The law is, that the will is equally revoked whoever survived. By the death of the child, it is that the will is not revived by the law of England ; they assume this doctrine from the civil law ; but I deny this. The general principle is, that marriage and the birth of a child revoke a will. There have been many decisions on the point ;—the principle on which they have been founded is the change of intention grounded on a total change of circumstances ;—it has been said the change is not so great in the case of a widow as in that of a bachelor,—*Salmon v. Sullivan*, before Dr. Hay, was cited by Dr. Calvert in *Myall v. Duffield*, as deciding equally the revocation in one case as the other. There is no case where the quantity of property affects the revocation. *Altham v. Grey* is mis-stated in *Ambler*, as appears from Sir George Hay's argument in *Shep-*

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in this instance on the Court of Chancery, but it had not the power to do so; it is bound to proceed, the two jurisdictions might take a different view of

hard v. Shepherd, 5 T. R. —Brown v. Thompson, 1 Eq. Ab. 413. The general rule is, that it is a revocation, unless there is evidence to the contrary.—In Thompson v. Myall and Shepherd, (in the Prerog.) Dr. Calvert decided on the declarations and evidence of intention that the will should stand.—From a note of Dr. Paul's, it appears, that in Barrow v. Baxter, (Prerog. 1695,) Baxter made a will in June 1680, in which his sister and her husband were executors:—it was contested by his widow, who set forth that on the 26th of June 1686, he married her, and had issue a son, born twelve months afterwards, who lived three years, but died before his father;—these facts were admitted in the answers, setting forth also that the wife's fortune was secured to her by settlement.—A plea was given in, stating misconduct of the wife, and ill treatment of the husband by her, —there were depositions establishing this fact; and one witness spoke to her insanity.—The Court held the will to be revoked.

If the quantity of property disposed of is admitted to be of consequence, the decision must be a very uncertain criterion; one judge may hold one quantity sufficient, and another may hold another.—The second wife succeeded to the same place in the deceased's affections which the first had, why are we not to presume that there was an intention she should be provided for. A duplicate also was executed; and this is material to shew that one will was with the testator which it was in his own power to revoke at any time.—According to the civil law it was presumed that the father survived for a little time, when a will was held revived by the Prætorian law; it was on the presumption of the revival of intention. This was the equitable rule, not the strict law founded on the presumption of intention,—where there was no such intention the will was not supported as in case of the death of the real posthumous, where the father was dead before, is the exception; there could be no intention; the same rule applies here where the father survived so little time, in such particular circumstances.—I do not think the rule is derived from the civil law:—the child was

the question. That matter has not now been gone into;—the argument has been confined to which of the two parties is entitled to the administration.

the only object there, the wife none; the marriage was on a different footing:—marriage is no revocation; the birth of a child was an actual, not a presumptive revocation.

Sir WILLIAM SCOTT *in reply*.

Zouch leaves every thing in doubt.

Per Curiam.

That work was not designed as an authority for courts; but as a disputation for the schools.

Sir William Scott.—The rule of the civil law was, as has been laid down, the death of a *quasi posthumus* child set up a will again: it is not necessary to shew that the father lived a considerable time after. If it is established by evidence, on presumption that the father survived, it is sufficient;—it is not necessary to prove the intention, the rule of law takes place. In *Barrow v. Baxter*, it does not appear that there were not other circumstances in the case; there might be many; it seems to have been a case of intention, it would certainly go some way to shew that the rule of the civil law is not adopted.

In *Salmon v. Sullivan*, it is not stated that the party was a widower with *children*,—if he was without children, it is the same as if he was a bachelor.

In *Calder v. Calder*, the court said all the circumstances were to be considered; that the quantity of property given was of consequence, to see how far the wife and children were deprived of subsistence—it is extraordinary if marriage and the birth of a child do revoke any testamentary paper giving even a small legacy; that no such case has been brought before the courts. Lord Mansfield in *Cubitt v. Brady* declared he knew none where there was not a total disposition. There are many small legacies to friends, as probable an intention of the deceased as a provision for his wife. The smallness of the property is a very material part of the evidence; if it is such as he might naturally dispose of after marriage and the birth of children, the presumption is weaker, and less evidence is sufficient to sustain the will. If the authority of the Roman law had

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The first and preliminary question is, on which side lies the presumption? on whom the burthen of proof? The administration prayed is not to

been considered; the case of *Barrow v. Baxter* would have received a different decision. It is generally allowed that the doctrine is taken from the civil law, though we may not have adopted all the particular rules of that law,—no part of it is more reasonable than the revival under these circumstances.

*Dr. Nicholl, on the same side in reply.*

I do not agree in this case that it is either an absolute revocation, as if the will had not been made; or an absolute taking effect, unless there is evidence of intention afterwards. I think as Lord Mansfield did in *Cubitt v. Brady*, that it is merely a presumption to be taken away by any evidence. It had been said, the reason in *Brown v. Thompson* was that the provision made would go to the same person,—the wife would take care of the children;—the presumption here is that it was left to her to take care of them.—It has been said the change of circumstances is the only principle;—this is not so, but it is the intention to be inferred from such a change. Then if the situation of the deceased is such that but a little change of circumstances is effected by marriage and the birth of a child, and the intention might reasonably be to make the same disposition, then there is no presumption from intention. Here there is no material alteration in circumstances: he made his will when he married; when he died he was substantially in the same condition,—the residue under this will was lapsed, and would be a provision for this wife and child. The residue is never held immaterial;—there are very few legacies which the deceased clearly intended always to give, and it was always his intention to give the management of the estate to these executors.

JUDGMENT.

Sir WILLIAM WYNNE.

George Netherwood executed a will in October 1783, by which he gave 188*l.* in legacies, and left the residue to his wife by the name of Elizabeth Lomax, spinster,—he left his real estate to his wife for life, and the remainder to a cousin,—he

the wife, but to the husband—*prima facie*, it belongs to the next of kin of the party deceased—to him and to his property the wife, or next of kin has

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Term.

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DIPLOCK.

appointed Mr. Sarmada his executor in England, and other persons in the West Indies—the personal property by the inventory amounts to 8,000*l.*; the real estate as far as appears, is about 27*l.* *per annum*.—The probate which had been granted to the executor is called in,—and the executor is called upon by several cousin-germans to shew cause why the deceased shall not be pronounced to have died intestate. An allegation has been given, and answers taken to it:—on them the cause is brought on. The facts of the case are, that after the execution of the will, *i. e.* in March 1789, the wife died, leaving children,—in November 1789, he married Anne Lomax, her sister; this is not material after the death of the parties,—and had issue one son. In 1791 they all embarked together, the husband, the wife and her child, and the children of the first marriage, from Jamaica; and they have not been heard of since. The vessel is presumed to have foundered at sea, and all to have perished. It is contended by the next of kin that by marriage and the birth of the child this will is void by implication of law,—while on the other side it is maintained that the circumstances of the case are sufficient to rebut the presumption.

It is said there is a duplicate, and that circumstance would be of consequence; if it appeared that the will was in England all the time the deceased was absent so that it was not in his power to resort to it, though it does not appear; the other might have been in his custody all the time. Therefore this is not in the consideration of the court. The office never asks for a duplicate. It has been argued for the executor that though a will made by a bachelor is void, yet if a will is made by a widower or married man having children, this would make a difference; and in support of this they have referred to the case in the margin of Ambler which seems a mistake,—it is certainly so, if this is the same case which was here before Dr. Lee, which I think it is not. I cannot see the principle. I take the principle to be change of circumstances founding the presumption of a change of intention. I do not see why he is not to be presumed to have the same intention for

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Term,  
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v.  
DIPLOCK.

a right to administer under the statute of administrations.

But it is laid down in the books, that in case of the second wife and her family as for the first.—I do not see the principle on which to make any alteration :—then there is no difference whether it be made by a widower or a bachelor.

The argument is by far more weighty which is founded on the operation and effect of the will under the circumstances,—the legacies to his friends are small in proportion to his fortune,—by the death of his first wife the bequest of the residue lapsed : therefore the children by the second wife would have come in for an equal distributive share with those by the first.—There is a declaration of Lord Mansfield in *Cubitt v. Brady*, intimating an opinion, that he went on the total deprivation of fortune to the children ;—if a small part is given,—only legacies to friends, and no more, and an ample provision is left for his wife and children, I know of no instance where the will has been held revoked. I think that the principle does not militate against this.

Here the testator gave small legacies to his friends, and gave the bulk of his fortune to his wife ;—probably this was early after the marriage ; probably most of the children were born after. The birth of a child only, is not a revocation, he might mean to leave the children in her power.—It is not improbable that the deceased might suffer the will to remain, notwithstanding the second marriage and the birth of the child, knowing the effect of it.—Then I think there is strong ground to contend that if he died, the second wife and her child surviving him, that the case is not within the rule.

But in the case of *Barrow v. Baxter*, it seems the court was of opinion that the death of the child subsequent to the will would not make any alteration ;—there having been a marriage and birth would make the revocation take effect,—nothing after would alter it.

I think this is the same case as the *questio vexata* here, and at common law,—of a man making a will,—then a second will, and then cancelling the second. It would have been held here down to *Helyar v. Helyar*, before Sir George Lee in 1756, that

there being a residuary legatee, the statute does not apply. The next of kin has the *primâ facie* right; but if there is a residuary legatee, he would be entitled;—there is no such person here, for the party claims derivatively from the residuary legatee.—The burthen of proof lies on him, to shew that the deceased left a residuary legatee;—the next of kin of the residuary legatee is to shew that the wife survived her husband.—The same was the rule in the civil law, as has been satisfactorily stated in argument,—the proof of the wife's surviving must

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Easter  
Term;  
TAYLOR  
v.  
DIPLOCK.

the first will remained revoked.—That case was appealed to the Delegates, but never came to a sentence.—In the courts of common law, as in *Glazier v. Glazier*, it has been held that the first will would be re-established. In *Cubitt v. Brady*, Baller, Justice, said, *Implied revocations depend on circumstances at the death of the testator*. Therefore I desired the fact to be considered of their having all perished in the same ship. In the Roman Law there is no doubt by the latter Prætorian law which is to be considered as the amended law,—*Revocatio agnatione sui hæredis* would perfect the revocation;—it was not implied that it should revive.

I desired the priority of the death of the parties to be considered. I always thought it the most rational presumption that all died together, and that none could transmit rights to another, which seems the opinion of Zouch.

Then what are the circumstances at his death? He had neither wife, nor children; therefore there is nothing to raise the implication of revocation at that time. Under these circumstances, therefore, considering that great part of the property lapsed which would raise a great doubt whether the revocation was to take place,—and taking into consideration the other circumstances that there was no wife, or child at his death, I pronounce for the will.

1815.  
Easter  
Term,  
  
TAYLOR  
v.  
DEPLOCK.

be shewn, otherwise the deceased left no residuary legatee.

If we resort to the probability of what the deceased would have done ; can it be supposed that he would have allowed the whole of his property to have gone from his own brother and sister to his wife's relations?—but the presumption of law is more worthy the consideration of the court ;—it is in favour of the parties, on whom the law would throw the right.—The civil law is in favour of the last possessor.

Thinking as I do, that it is incumbent on the next of kin of the wife to prove her survivorship ; how stands the case on the evidence ? There is no evidence direct as to the point :—some inferences have been deduced,—it is stated in the first affidavit, that the two bodies were found together ; this tends to shew that they were in the same situation at the time of death ;—for it is improbable if one had been in the cabin and the other on the deck, that both should have been thrown up together ;—supposing them in the same situation, the ordinary presumption that the husband has more strength and more fortitude would raise the inference that he had survived. The facts stated in the first affidavit seem to support this idea, *vis.* “ that Job “ Taylor being on the upper deck, offered 2000*l.* “ reward to any one who would go below, into the “ cabin, and endeavour to save his wife ; that the “ water had at that time entered the cabin, in “ which Lucy Taylor was, to the height of several “ feet ; and Job Taylor finding no one willing to “ make the attempt, went down himself into the



“cabin, and there is every reason to believe that  
 “Lucy Taylor, who was of a timid disposition,  
 “was so terrified by her perilous situation (for the  
 “vessel had split in the middle), that she was in a  
 “dying state before her husband could get near  
 “her.” An attempt has been made in the other  
 affidavits, at a different representation,—but these  
 affidavits ought to have been brought in originally ;  
 the Court is not quite clear that it did right in  
 admitting them ; because, before they were made,  
 the persons making them had seen the other affida-  
 vits and heard the intimation of the court as to the  
 gist of the case.—These affidavits, however, do  
 not satisfy my mind, that the wife survived. The  
 whole that Lieut. Dicker states is, that the wife was  
 active and bustling, and the husband was afflicted  
 with an asthma ;—but he had not seen them since  
 the September preceding. She might have been  
 active and bustling ; but, in a moment of danger,  
 the timidity of her sex might overpower her :—on  
 the other hand, the husband might at times have  
 suffered from an asthma, and yet in the moment of  
 difficulty been able to exert himself with effect.—  
 None of the witnesses represent the husband at  
 the moment to have been in a weak infirm state,—  
 none represent him as having lost his recollection.

Looking to their comparative strength, there is  
 nothing to take away the ordinary presumption,  
 that a man was likely to survive a woman in a  
 struggle of this description ;—still less is there any  
 thing to prove the contrary.—James Roe, in an  
 affidavit brought in so late, in contradiction to  
 the first, is in some degree in contradiction to all

1818.  
 Easter  
 Term.

TAYLOR  
 v.  
 DICKER.

1815.  
*Easter  
Term.*

TAYLOR  
v.  
DIPLOCK.

the others: I cannot rely on the accuracy of this witness; he places the parties in a different situation from the rest: but even if he were correct, it would be merely founded on a slight presumption, that the person in the cabin would die first.—Three persons have sworn that they saw them both together.

Upon the whole I am not satisfied that proof is adduced that the wife survived: taking it to be, that both died together, the administration is due to the representatives of the husband.—I assume that they both perished at the same moment, and therefore I shall grant the administration to the representatives of the husband. I am not deciding that the husband survived the wife.

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*The Proctor* for Mrs. Diplock prayed that the sureties might be compelled to justify.

*Jenner and Phillimore.* This is contrary to all practice.

*Per Curiam.*

Great caution should undoubtedly be used; but I believe the application is unprecedented. I wish the registrar to state whether he has known an instance of it.

*The Registrar*, (Mr. Gostling,) said he had been registrar 40 years, and could remember no instance of it.

The application was rejected.

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CONSISTORY COURT OF LONDON.

CRESSWELL v. COSINS, by her GUARDIAN, falsely  
calling herself CRESSWELL.

1815.  
*Easter*  
*Term.*  
*April 28.*

**JOHN CRESSWELL** was married on the 13th June, 1814, to Susannah Cosins, by a licence obtained upon his oath, in which both the parties were described as above the age of twenty-one years.

An additional article to a libel in a cause of nullity of marriage, by reason of minority, rejected.

In Michaelmas term of the same year, he took out a citation against his wife in a cause of nullity of marriage, by reason of minority;—a libel was given in pleading the minority of his wife, and that the marriage was had without the consent of the mother, the father being dead. The present question arose upon an additional article to the libel, which was now offered to the court on behalf of the husband.

The article pleaded “ that at the time of the solemnization of the marriage Ann Cosins, the mother of Susannah Cosins, was totally unacquainted with John Cresswell, and had never spoken to him, or even seen him but once, when he passed by the window, and she the said Ann Cosins knew nothing of the marriage, till after the same had taken place, and that the said Susannah Cosins hath at

1815.

Easter  
Term.

CRESSWELL

v.

COSINS.

divers times subsequent to the said marriage declared in the presence and hearing of divers credible witnesses that her said mother knew nothing about the said pretended marriage until after it had taken place, and that the said Susannah Cosins never told her mother thereof, and that her reason was because she was so young that she thought her mother would not consent."

*Lushington in objection to the allegation.*

This is not the best evidence; the mother is living, and to be examined; it may be pleaded and proved, that she made this declaration at a time when we cannot bring witnesses to contradict it,—the reason against admitting the wife as evidence against the husband, is the influence which may have been used;—it may go to bastardize the issue;—the wife is not permitted to give any evidence which may tend to bastardize the issue. Goodright v. Moss, Cowper, p. 592. Peake lays it down in his book on evidence, that no evidence of husband or wife is admissible which tends to affect the civil rights of either. In a case of this description, where the husband is relying on his own perjury to annul his marriage, the rules of evidence ought most strictly to be observed.

*Swabey and Stoddart contra.*

The fourth article of the libel pleads, that the marriage was had without the consent of the mother. This is an additional article that it was without her knowledge; it is relevant therefore, and not a replender.

The cases cited are good, for the purposes to which they apply; but they do not apply to this;—

here we may ask for the answers of the woman, though we admit it is not commonly done:—what weight her declarations might have, if they should not be confirmed by other evidence, would be matter for argument.

**JUDGMENT.**

**SIR WILLIAM SCOTT.**

Cases of nullity are properly described as cases in which the court gives a reluctant obedience to the provisions of the law.—The first inclination of the court is to support the marriage, as far as it can indulge such an inclination; particularly where the marriage is had on the oath of the party himself who endeavours afterwards to set it aside; and particularly where the age of the party is such as not to make his misapprehension probable.

Here the libel was admitted without opposition. It pleads that the father died before the marriage, that there was no guârdian, and that the man was an utter stranger to him.

I do not see how this article is relevant.—The mother is to be produced as a witness;—it is to be expected she will depose that she gave no consent;—it is probable she will state the cause that no consent was required, or she did not know him;—this is to be presumed. But it is now pleaded that the mother was totally unacquainted with the man, which I suppose means personally unacquainted. Consent may be given without this; it is usually given under other circumstances,—but it is not required by law, or reason on which the law is founded, that there should be a personal knowledge;—this, therefore, if proved, would not go

1815.

*Easter  
Term.*

*CRESSWELL  
v.  
COSINS.*

1815.

*Easter  
Term.*

CRESSWELL

v.

COSINS.

a great way. She pleads, the mother did not know of the marriage till after it took place. I think this would probably come out on the examination, as to consent. If the rest of the allegation be not admissible, I shall not admit this part of it. It pleads the declaration of the woman that her mother did not know of the marriage. I think this is properly objected to;—loose declarations in conversation by the wife are very different from admissions in her sworn answers;—it may be the effect of collusion between the parties, to get rid of the marriage by means of loose declarations. The Court is open to the caution of not setting aside a marriage, for which purpose the parties may collude.

I think, therefore, that these declarations are slight in themselves, and that in this stage of the cause they are not admissible.

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Allegation rejected.

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JONES, falsely called ROBINSON, v. ROBINSON.

1815.  
*Easter*  
*Term,*  
*May 25.*

## JUDGMENT.

Sir WILLIAM SCOTT.

In this case there is proof of those facts on which the Court usually grounds a sentence of nullity : it is shewn that the woman was born on the 25th of May, 1779, and married on the 12th of May, 1797 ; and therefore she was a minor. The marriage was by licence, without the knowledge and consent of the father. These circumstances are attended by others startling to the Court ; the marriage had subsisted sixteen years, and children are born from it.

Nullity of marriage by reason of minority established, the woman being a Jewess.

The question, however, is whether the general law of marriage applies to this case ? The general law of the marriage act makes the marriage by licence of minors, without consent, null. This clause is restrained, as to its effect, where the parties are Quakers, or Jews ; that is, where they are both so, they having rights of marriage of their own. The woman appears to be a Jewess,—at least she is descended of Jewish parents ; that she continues so, is not proved :—taking it to be so, she is not within the clause, which is as to the case of both parties.

The marriage was solemnized after the Christian form—whatever her persuasion was, she conformed

1815.

*Easter  
Term.*

JONES

v.

ROBINSON.

in this respect to the Christian religion ;—so she submits to the restrictions of that form, and is bound to the consequences if she departs from them.

I must pronounce this marriage to be null and void.

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## ARCHES COURT OF CANTERBURY.

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 STALLWOOD v. TREDGER.
 

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*By letters of request from the Commissary Court  
of Surry.*

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1815.  
Easter  
Term,  
May 27.

**W**HILE the church of St. Mary, Newington, was shut up, being unroofed and in part pulled down, the banns of marriage were published for three Sundays in the adjoining parish church of St. George's, Southwark, between James Stallwood and Maria Tredger, both parishioners of St. Mary, Newington:—and on the 13th of August, 1792, these parties were married on the site or ruins of the church of St. Mary, Newington.

A church being under repair, and shut up, a publication of banns in the church of an adjoining parish held to be sufficient.

The following entry of the publication of the banns was made in the register book:

(A.)

Extracted from the register book for the publication of banns of marriage, according to act of Parliament of the twenty-sixth of King George the Second, kept for the parish of Saint Mary, Newington, in the county of Surry, commencing the twenty-

1815.

*Easter  
Term.*

sixth day of April, in the year One thousand seven hundred and eighty-nine, and ending the seventh day of May, One thousand seven hundred and ninety-seven.

STALLWOOD

(The year 1792.—Page 146.)

v.

No. 709.

TREDGER.

Banns of marriage between James Stallwood, batchelor, and Maria Tredger, spinster, both of this parish, were published on

Published at  
St. George's,  
Southwark;  
Newington  
church under  
repair.

the three Sundays underwritten, that is to say,

On Sunday, the 29th day of July, 1792, by me, T. Wigzell.

On Sunday, the 5th day of August, 1792, by me T. Wigzell.

On Sunday, the 12th day of August, 1792, by me, T. Wigzell.

The above is a true copy, or extract from the register book of the publication of banns, kept for the parish of St. Mary, Newington, in the county of Surry, having been carefully examined with the original, and found to agree therewith, the tenth day of March, in the year of our Lord One thousand eight hundred and fifteen, by me,

JOHN WILLIAMS.

On the 8th of May, 1815, a libel was given in by the husband in a suit of nullity of marriage, on account of the undue publication of banns.

*Lushington and Cresswell for the husband.*

The words of the statute are imperative that the marriage shall be solemnized in one of the churches or chapels where the banns have been published, and *in no other place whatsoever.*

*Arnold and Swabey contra.*

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit for a nullity of marriage, brought by the husband against the wife.

Two persons legally competent to contract marriage, and willing to contract it in their own parish, make the proper application to the minister for that purpose. The parish church being under repair,

and in consequence no divine service performed in it, a publication of banns there was impossible ; —the purpose could not be answered ; —the publication was made in the church of an adjoining parish, —but the marriage was solemnized in the church of the regular parish, it being sufficiently advanced in repair for that purpose.

1815.  
Easter  
Term.

STALLWOOD  
v.  
TREDGER.

The question is whether this marriage is valid or void.

It is a case of momentous importance, and a new case ; —no doubt it would have been a valid marriage, before the marriage act ; the question is, whether that act, in its sound interpretation, renders it a void marriage.

The clause of the marriage act recited does not expressly and in terms declare the marriage void ; —but it is contended, that such must be the construction of it, with reference to the rest of the act.

I am not disposed to go to the extent of giving an opinion, that under no circumstances would a marriage be void, if contrary to this provision, —and had elsewhere than in the church in which the banns were published ; —for instance if the banns were *bonâ fide* and honestly published at York, and the parties were to come to London to be married, whether such a marriage would be void. —I feel myself at liberty to take the question on narrow grounds, and on its own particular circumstances. The act was passed to prevent clandestine marriages, and the preamble to this section of it has been relied upon in proof of this : but this is any thing but a clandestine marriage ; —neither of

1816.  
Easter  
Term.

STALLWOOD  
v.  
TREIDGER.

the parties are minors,—there is no attempt at concealment,—there existed no impediment to it; they apply to the minister,—he publishes the banns in the best manner he was able,—the marriage is solemnized, and twenty years afterwards the parties come to get this marriage set aside;—probably an hundred marriages may have been celebrated in this parish in a similar manner;—probably other marriages may have taken place under the same circumstances, in other parts of the kingdom. This proceeding is of a most alarming and momentous nature,—affecting in its consequences the comfort and situation in society of many individuals, and the rights of children emanating from such a state of things.

This is not a case within the spirit and meaning of the act;—nothing but the most imperious demands of judicial interpretation of the act could induce me to hold this marriage invalid. It has been truly said, that the court must interpret the laws, and not make them; that it must meet, and not create doubts;—but in construing doubtful acts, it certainly is the duty of the court to suppress the evil and advance the remedy;—the law does not require impossibilities of any party;—nor is it to be presumed, that the legislature intends to introduce rules in contradiction to its general policy:—it was impossible that the banns could be published in the church of St. Mary, Newington. There was no service in the church;—and is it possible that, in this populous parish, the law should intend that there should be no marriages at all—either by licence or by banns? for, according to the interpret-

ation contended for, parties could at this time be regularly married by neither, while the church was under repair.—What then was to be done? That I think which has been done.—The minister does all he can to comply with the letter and spirit of the law.—There had been no service for two years in the church of St. Mary, Newington.—It is provided by the act, that the banns as to extraparochial places, shall be published in the church or chapel adjoining them;—and under the particular situation of the church at this time St. Mary Newington is to be considered as an extraparochial place, and St. George's Church would consequently become the proper place for the publication of banns.—The marriage was entered in the banns' book of St. Mary's, signed as such, and an entry also made explanatory of the cause of the publication having taken place in St. George's church; the parties considered it throughout as a publication of banns in the church of St. Mary Newington;—if so, that church became the proper place for the solemnization of the marriage;—for which it was not in an unfit state; though it was for the publication of banns as no persons resorted there.

Under all these circumstances, and taking the facts of the case as fully and fairly stated in the libel, I am of opinion, that the marriage is not invalid;—that neither the spirit nor the letter of the act are violated;—there is nothing clandestine in the transaction; the parties did all in their power to comply with the requisites of the law, and the act itself I think has provided for such a case;—the publication of banns must be considered legally as having

1815.

*Easter  
Term.*

STALLWOOD

v.

TRENGER.

1816.

Easter  
Term.STALLWOOD  
v.

TREDDER.

been in the parish church of St. Mary, Newington:—Looking also at the alarming consequences, which would result from a contrary decision, I am confirmed in this opinion,—and accordingly I reject the libel, and dismiss the parties from the suit.

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1816.  
Nov. 28.

This cause was carried by appeal to the High Court of Delegates, and finally heard at Serjeants' Inn; before Mr. Justice Bayley, Mr. Justice Dallas, Mr. Baron Richards, Dr. Adams, Dr. Burnaby, and Dr. Meyrick.

Mr. Serjt. Best, Dr. Arnold, Dr. Swabey, and Mr. Clarke, were counsel in support of the sentence of the court below.—Dr. Lushington, Dr. Cresswell, and Mr. Brougham, *contra*.

The court directed the counsel against the sentence to begin; and, having heard Dr. Lushington only, affirmed the sentence of the Arches Court of Canterbury.

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CONSISTORY COURT OF LONDON.

1816.

The Office of the Judge promoted by  
CANNING v. SAWKINS.

Trinity  
Term,  
June. 9.

**T**HIS was a suit promoted by William Canning, churchwarden, of the parish of Rickling, in the county of Essex, against James Sawkins, an inhabitant of the same parish, under the statute 5 and 6 Edward VI. for quarrelling, chiding, and brawling in the church.

A parishioner suspended *ab ingressu ecclesie* for three weeks for brawling in the chancel of a church.

The party proceeded against was charged with having on the 12th of April, 1815, at a meeting of the parishioners and inhabitants, held in the chancel of the parish church at Rickling, for the purpose of examining the accounts of the overseers and other business of the parish, with having addressed the churchwarden in the following words, "*You are an old scoundrel, and the next time you come to church I will lock you out ; you are not fit to enter a church ; I will thrash you with my stick ; I will fight you for a guinea.*"

James Sawkins gave an affirmative issue to the articles exhibiting this charge.

JUDGMENT.

Sir WILLIAM SCOTT,

Suspended Sawkins for three weeks *ab ingressu ecclesie*, desired it to be notified in the church that he was so suspended, condemned him in the costs of suit, and monished him against such conduct in future.

## PREROGATIVE COURT OF CANTERBURY.

1815.  
*Trinity*  
*Term,*  
*June 10.*

INGRAM v. STRONG and ROBERTS v. LAWRENCE.

A conditional will not converted into an absolute will, it being shewn that the condition had been satisfied.

**RICHARD TRAVERS**, of Uploders, in the county of Dorset, died on the 28th of July, 1813, possessed of a freehold estate, valued at 40,000*l.* and personal property amounting to about 6000*l.*

The following instruments were propounded as his will :

*No. 1.*—A will dated January 8, 1804, in the hand-writing of the testator, and executed in the presence of three witnesses. It was of considerable length ;—it bequeathed all his freehold, leasehold, and copyhold estates, and all his personal estate and effects to his friends and relations, John Strong and Richard Roberts, upon trust, to sell all the estates and effects, and after discharging his debts, and funeral and other expenses, to apply the remainder to the payment of his legacies. These legacies, varying in amount, were to upwards of sixty of his relations and friends. It was declared also, that if the legacies bequeathed should be found to exceed his property, a propor-



tionable abatement should take place on each legacy; and, on the contrary, if it should exceed it to have the like proportion added to each legacy.

Mr. John Strong and Mr. Richard Roberts were appointed executors.

To this will there were added two codicils, one dated the 9th of January, 1815,—the other 26th of June, 1806.

1815.  
*Trinity*  
*Term.*  
~  
INGRAM  
v.  
STRONG,  
and  
ROBERTS  
v.  
LAWRENCE.

No. 3. was as follows:

“Weymouth, July 31st, 1806.

“I, Richard Travers, of Uploders, in the  
“county of Dorset, being of a sound mind  
“and understanding, do this day, as above  
“written, make this as my last will and testa-  
“ment, (that is, *in case my last will, before*  
“*this wrote in my own hand, and witnessed*  
“*by John Way and others, should be by any*  
“*of my relations disputed,*) as follows, I give  
“unto Captain Nicholas Ingram and Fanny  
“Roberts of Brown’s Farm, in trust *for their*  
“*sole disposal* all my landed and personal  
“property, of every kind and description  
“whatsoever, goods, chattels, monies, with  
“every other thing that I am possessed of, to  
“my relations and friends, in such propor-  
“tions as they shall think right, just, and pro-  
“per. I give and bequeath to each of them  
“five hundred pounds for their own private  
“use, as a compensation for their trouble. I  
“*beg to observe that I am at this time of a*  
“*perfect understanding* and fully convinced  
“that my two worthy friends will do great  
“justice to this my last request, in the disposal

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" of my property and effects. As witness my  
" hand,

RICHD. TRAVERS.

" Published and declared in the pre-  
sence of, and witnessed by us,  
WILLIAM NEEDELL,  
JOHN HELLIER,  
RACHEL SLADE."

This will was folded up as a letter, and endorsed,

" *Captain Ingram,*

" *Weymouth.*"

This is to be opened by Captain Ingram, but not by any one else.

No. 4. was to the following effect :

Memorandum made this July 2, 1813; Admiral  
Ingram and Mrs. Roberts are desired to go by this  
paper as a direction for them in the will that I  
have placed in Admiral Ingram's hands.

|                                         |       |
|-----------------------------------------|-------|
| John Strong, . . . . .                  | £1000 |
| Saml. Strong, . . . . .                 | 1000  |
| Mrs. Davis's family, . . . . .          | 1000  |
| Messrs. Burts, . . . . .                | 1000  |
| Richd. Roberts children, . . . . .      | 1000  |
| Robert Robert's children, . . . . .     | 1000  |
| own use Mrs. Richards, . . . . .        | 1000  |
| Not Husband.                            |       |
| Wm. Mrs. Roberts's child . . . . .      | 1000  |
| eren                                    |       |
| The Bowring famy. . . . .               | 1000  |
| Mrs. Cook, a <i>hundred</i> , . . . . . | 100   |
| Rich <sup>d</sup> . Gill, . . . . .     | 500   |
| Rob <sup>t</sup> Gill, . . . . .        | 500   |
| Messrs. Burts, . . . . .                | 1000  |
| S. Honeybourn, . . . . .                | 500   |

|                      |        |
|----------------------|--------|
| S. Hyde,.....        | 500    |
| Fanny Hansford,..... | 500    |
| Mary Gill, .....     | 500    |
|                      | <hr/>  |
|                      | 13,100 |

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|                                                              |      |
|--------------------------------------------------------------|------|
| Henry Gibbs,.....                                            | 200  |
| Capt. Lawrence, .....                                        | 500  |
| John Hallett, the part of his mother and aunt, .....         | 500  |
| Henry Gibb's unmarried sister, ..                            | 100  |
| The two who married Northover, each 25l.....                 | 50   |
| Peggy Best,.....                                             | 200  |
| Jenny Lawrences children equally,                            | 200* |
| John Sutherlands two children, William and Mary,.....        | 500  |
| This is for Admiral Ingram, to go by Sabines,<br>R. TRAVERS. |      |

Jos. Way, Jun. 200† in trust.  
Capt. Lawrence.  
Sir Evan Nepeans's  
The Snaydons to be guarded against. ‡  
Henry Gibbs, Jun.

Lawrence family  
Capt. Lawrence  
Peggy Best, suppose 3 child<sup>ren</sup>  
Nancy Knight, no child  
Jenny left two children  
Fanny Gibbs  
Mary Sawkins.

\* This should be only £20.

† This should be in full.

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### Further Legatees,

John Budden, Uploders

John Axe, Lodgers,

Henry Gale, Upton,

John Hallett, Shipton.

*No. 6.* was an incomplete testamentary paper, entitled "An account of Richard Travers's relations," in which there are the names of several relations and other persons, with sums opposite their names, —and at the bottom the following memorandum:—  
*"These are the instructions given by Richard Travers to Giles Russell, to make his will by, to-morrow morning."*

*No. 5.* was a fair copy of *No. 6.*

*No. 1.* and the two codicils annexed to it were propounded by Mr. Strong and Mr. Roberts;—*Nos. 3.* and *No. 4.* by Admiral Ingram; and *No. 5.* and *No. 6.* by Captain Lawrence. There were several other testamentary papers of an older date before the Court, which were not propounded.

Allegations were given in on behalf of the several parties contesting suit, and witnesses were examined upon them. There was full proof of the due execution of the will of Jan. 8, 1804, and of the two codicils annexed to it,—of the testator's sanity on the 31st of July, 1806, the date of the conditional will,—and of his dictation of *No. 5.*, the last testamentary paper.

With respect to the other points of the cause; *Thomas Marsh* deposed, "that he went to see "Mr. Travers on the 26th of July, 1793,—that he "found him confined to his bed,—that while sitting "by his bed-side, Admiral Ingram and Capt. Lawrence came to visit him; and after enquiring after

" his health, Admiral Ingram almost instantly said,  
 " 'For God's sake do make a will, that the one in  
 " my hands may be done away with, and Mrs.  
 " Roberts and myself may not be left in so much  
 " trouble that we shall never get rid of as long as we  
 " live.' And Admiral Ingram then stated to all  
 " present, that the deceased had by the will which  
 " he had made, and which was in his hands, given  
 " him and Mrs. Roberts the power to give away all  
 " his property as they liked. He then strongly and  
 " repeatedly urged the deceased to make another  
 " will, and used several arguments and persuasions  
 " to induce him so to do, and kept desiring 'that  
 " he would for God's sake make a will;' by which  
 " the deceased seemed very much agitated and dis-  
 " turbed; and answered that he would make a will,  
 " and would send for Mr. Russell, (meaning his  
 " attorney,) to do it;—upon which the deponent  
 " offered to go for Mr. Russell for him, but the  
 " deceased declined his offer, and said that he would  
 " write a letter to him and send a boy with it, or to  
 " that effect: and a pause having then taken place,  
 " without a word being uttered by any one for a  
 " minute or two, and the said deceased seeming  
 " then to be very uneasy, and disturbed, and rest-  
 " less, and his face having flushed up as red as fire,  
 " he then said—'I want Betty, I want Betty,'  
 " (meaning his maid-servant, Betty Bishop, then  
 " Betty Bagg,) and appeared quite anxious to get  
 " rid of the conversation. And thereupon the said  
 " Admiral Ingram, Captain Lawrence, and the de-  
 " ponent, left the room; he, the deponent, having  
 " told the said deceased, (when he was about so to  
 " leave the room,) that he would see him again to-

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"morrow : and the deceased having answered, ' Do  
"so.' And when the deponent had left the said  
"deceased's room, he told the said Betty Bishop,  
"then Betty Bagg, (who was an old and confiden-  
"tial servant of the said deceased, and who had  
"withdrawn and absented herself from the room  
"whilst the aforesaid persons were so with the said  
"deceased,) that her master wanted her, upon  
"which he hath no doubt but that she immediately  
"went into the room to the deceased. That on the  
"next day he repeated his visit to the deceased, and  
"found him still confined to his bed and Mrs.  
"Roberts sitting by his bed-side, and the deceased  
"said, we are talking over things I wish you to  
"hear ; and then entered into a conversation as to  
"the legacies he intended to leave his relations, and  
"named many of them, and discussed the claims  
"they had on him, and mentioned his intention to  
"give other legacies, and took up a paper which  
"was in his own hand-writing, and which was a  
"list of such persons, and added some other names  
"to them." And he says that he had engaged in  
"this conversation with the deceased, *under the*  
"*impression that he had no other will than that*  
"*which Admiral Ingram had spoken of ;* but the  
"deceased, at this particular period of the conver-  
"sation, said, "*I have a will by me ; and taking*  
"*up a folded paper in his hand from off the bed,*  
"*(consisting apparently of more than one sheet of*  
"*paper)* said, and here it is ; *if I die I shall not*  
"*die without a will ; but I want to alter some*  
"*things in it, as some matters have occurred since*  
"*that I wish to provide for, and I want to do*  
"*something for my poor relations : and you see if*

*" I could give Henry Gibbs and a few others, some  
 " of whom he named, the value of 100l. a-piece  
 " or so, what good it would do them."*

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Betty Bishop deposed to the visit of Admiral Ingram and Captain Lawrence on the 26th July, 1814; and said, " that after they were gone the deceased called to her, and asked her why she had not come before to cut off the tale of the Admiral, (meaning the said Admiral Ingram) he has been bothering of me about making of my will;" —and the deceased seemed very cross and out of humour, and she answered, ' Dear Sir, I did not know I must come when the gentlemen was here.' And the said deceased replied, ' You know it is my particular wish for you to be here : ' and he then further said, ' I don't know what they see in me, they are so anxious about my making of my will.' And the respondent then further answered, and said, ' It is nothing but right, Sir; you should keep a will by you, you be'ent dead never the sooner, and I hope there's no likelihood of death now.'—And he the said deceased then replied, ' I have got a will, Betty; but I wish to make some alterations upon the account of my poor relations.' That the respondent, being much moved at such the deceased's conversation, went for a minute or two into the adjoining room, that he might not see her shed tears; and, on her then returning into the said deceased's room almost immediately afterwards, he said to her, ' Betty, I would have you kill a couple of chickens. I think to send up Gill this evening to desire that Mrs. Roberts, (meaning the aforesaid Fanny Roberts,) will come down to-morrow, and

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“ to-morrow I think to write over to Mr. Russell,  
“ and to desire that he will come over and see what  
“ we can do ;” meaning, as the respondent under-  
“ stood and believes, in respect to his, the deceased’s,  
“ making such his intended alterations in his will.”

*Robert Gill* deposed to the deceased giving him for the purpose of getting a will drawn up ;—to his requesting him to call on Mrs. Roberts on the evening of the 27th of July, desiring her to come to him the next morning, and assist him in making his will ; to his sending for Mr. Russell, his attorney,—to his vexation at not finding Mr. Russell,—and to the deceased’s requesting him on the following morning, (the 28th,) in the presence of Mrs. Roberts, to write down instructions for his will ; —to the deceased’s dictation of these instructions, as contained in No. 6. ;—to his reading them over to him,—and to the deceased’s directing him to transcribe them fair ;—and to his approval and subscription of the copy so transcribed, No. 5. ;—and to the deceased’s saying that “ *he hoped he should live till the next morning, that he might finish his will.*”

*Jenner and Lushington for No. 6.*

This paper contains the whole will of the deceased, at the time it was written,—it is complete as far as it goes ;—we propound it as containing the last intentions of the deceased, prevented from formal execution by the act of God. It is probable the deceased intended to have added the disposition of his real estate to the will the next day ; but this does not vary the question ;—the paper, as far as it goes, is complete ;—it is substantive in itself, and fully entitled to probate.



*Adams and Cresswell for No. 3. and No. 4.*

The capacity of the deceased is not affected beyond lowness of spirits ;—we must assume that the instrument was executed in a perfectly sound mind ;—it was dictated with a view to disputes which might arise amongst his relations ;—whether the condition be fulfilled or not is immaterial :—his relations have opposed the will, and there has been sufficient dispute about it to satisfy the condition at all events ;—but, taking it for the sake of argument, that the condition is got over, the deceased recognized this paper without any reference to the condition, when he alluded “ *to the will he had placed in Admiral Ingram’s hands* :—he evidently alludes to this, as making the will of 1806 complete in its dispositions. It should seem from the evidence of Mrs. Roberts and Mr. Marsh that there was a complete approbation of the will, without a reference to any condition. No. 3. and No. 4., make that disposition alone which the deceased intended to complete.

*Swabey and Phillimore for the will of 1804, and the two codicils annexed to it.*

JUDGMENT.

SIR JOHN NICHOLL.

The facts of this case lie within a narrow compass—and cannot be the subject of much controversy.

Mr. Richard Travers died in July, 1813. He had been in business at Bridport, in partnership with Mr. Roberts, and had amassed a considerable property both real and personal : but he had met with some risks in the course of his business, which

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occasionally affected his mind with a lowness and depression of spirits ; but there is nothing shewn which at any time amounted to actual insanity.

Several points are clear ;—his intention to die testate,—for there are several testamentary papers before the Court of anterior date to the will of 1804 : his intention to make a disposition of his property amongst his relations and friends on a very extensive scale :—and also his intention that his real as well as his personal property should be subject to this distribution.

There are three parties before the Court propounding severally the following testamentary acts. A will and two codicils of 1804. A will of 1806 with a further paper of directions. A paper of instructions of July 28, 1814.

The first is propounded by the two executors named in it, Strong and Roberts, who were personal friends of the deceased. The factum of this will, and of the two codicils annexed to it, is not questioned ; it is executed and attested in the usual way—it gives all his property, real and personal, in trust, to pay his debts and legacies ; and then proceeds to distribute his property, by legacies, amongst his relations and friends, to the amount of upwards of fifty ; and afterwards directs that if the legacies exceed his property they shall be proportionably diminished ; if they fall short of his property they shall be proportionably increased ; and he appoints Roberts and Strong executors.—Thus this will is a complete disposition of his whole property—real and personal:—it is uncanceled ; and must operate either in the whole or in part, un-

less it is revoked by some subsequent act of legal validity.

In 1806, the deceased made another will which is also attested by three witnesses. This is propounded together with another paper which I shall notice hereafter by Admiral Ingram, one of the executors named in it. It gives all his property to Mrs. Ingram and Mrs. Roberts to *be at their sole disposal* among his relations and friends. This is a strange disposition : and there is a very singular and unusual passage in it ; *viz. " I beg to observe that I am of perfect understanding."* This was probably written when the deceased was in low spirits ; and, from another passage in it, probably when he was under some irritation, and when he had heard that some of his relations, or his heir at law had said that he was not capable of making a will, and that they should dispute his former will ;—but still there is no sufficient ground to impeach the sanity of the deceased at this time, so as to render invalid a will executed regularly, and attested by three witnesses ; more especially as in a subsequent part of his life when there can be no question of his sanity, he recognized this paper. There is, however, another important passage in this will which gives it a peculiar character. He states that he makes it "*In case my last will before this, wrote with my own hand, and witnessed by John Way and others, should be by any of my relations disputed."*

Perhaps the object of this clause, and indeed of the whole will, is rather to hold *in terrorem* to his relations, " If you dispute what is done, or are dis-

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satisfied, these friends shall have power to controul you, and divide my property among you in their discretion," trusting that they would dispose of the property in the manner mentioned in the other will; and it is not impossible that he meant it as an additional guard to the will of 1804. It has been contended that this clause does not render it a conditional will, and that he only meant to assign the reason for his new disposition;—but this would be a forced and strained construction;—the more obvious meaning is to impose a condition, and that it was only to be called into operation in case his relations disputed the will of 1804:—I hold, therefore, that it is a conditional will, and necessary to be got rid of either by converting it into an absolute will by a subsequent act, or by satisfying the condition. A conditional will may be converted into an absolute one; and it is for the Court to consider whether the paper propounded with it, or any other paper can produce that effect.

From 1806 till within a few days of his death he did nothing further towards any testamentary act, except that in December, 1811, he wrote the paper D. which is entitled, "a memorandum for making my will." It contains a very detailed list of his relations and friends and their respective families, but no sums are annexed to their names; and it also contains some calculations of his property. Admiral Ingram's name occurs, not as an executor, but among the list of his friends. This paper too is rather contrary to the tendency of the conditional will, and implies rather that he himself

meant to do an act of distribution, and did not mean that Admiral Ingram and Mrs. Roberts should have the disposal of his fortune.

The deceased died on the 28th July, 1813. On the preceding Sunday (i. e. the 25th) he was visited by Mr. Roberts, and Mr. Strong, the two executors in his will of 1804; and there is no sufficient reason, in the judgment of the Court, to doubt that he continued his confidence in them till his death. He said nothing, however, to them about any intended alteration in his will, and probably had given up all thoughts of making a new will.

On the following day (the 26th) Admiral Ingram visited him—he, having had the conditional will of 1806 placed in his hands, was distressed, as he naturally might be, at the discretionary power vested in him; and, perceiving the deceased to be in a dangerous state, he pressed him to make a new will, and the deceased promised him so to do: but it certainly is highly probable that he would not have done it unless urged by his representations. It appears from the evidence of Mr. Marsh who was present, and Betty Bishop, that the deceased was disturbed at being thus pressed;—Marsh offered to go for his solicitor, but he declined it. On that evening however the deceased sat down to draw a paper of instructions for Admiral Ingram and Mr. Roberts. Mr. Gill, a relation, who was much with the deceased, found him, on the evening of that day, with a table and writing materials before him. Probably he was engaged in writing No. 4.; for he asked Gill if he knew any thing about the Lawrence family,—he desired Gill to call upon Mrs. Roberts, who was

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co-executor with Admiral Ingram, and to desire her to call the next day to assist him in making his will.

No. 4. is entitled *memoranda* made this 2d July 1813.

Where he first stopped and signed, the name is again repeated.

The name, however, is signed, not as finishing it, but as authenticating it as far as it had gone.

The object when he wrote this paper was to remove the condition ;—he had not completed it ; many persons are inserted without any sum annexed to them. It is incomplete, and unfinished— if he had gone on with this plan, and had finished No. 4, as a complete body of directions, and afterwards done no further act, it might have been a question whether the conditional was not converted into an absolute disposition, and the will of 1806 completed and confirmed by such an act.—Because when such new directions for an entire disposition of his property had been given, and that distribution was to be made by Mr. Ingram and Mrs. Roberts, whatever his original intention might have been, and however he might have allowed his executor to distribute his property if his relations disputed his will, yet now he had made a new distribution for himself, which superseded the former disposition made in 1804.

But No. 4, in my apprehension, can have no such effect, for he gives up this plan ;—he determines on making an entire new will ;—he makes out an entire new set of instructions ; and there is not the least allusion to Admiral Ingram, or Mrs. Roberts, when

the appointment of the executors is discussed.—  
The court therefore must consider No. 4. as  
abandoned.

On the morning of the next day the deceased  
sent a note to Mr. Russell, expressly desiring him  
to come and make his will. About one o'clock he  
received a note from Mr. Russell stating that he  
could not come that day, but that he would be  
with him on the following morning.

Mr. Gill, who as well as Mrs. Roberts was with  
the deceased when this answer arrived, says, the  
deceased was very uneasy when he found Mr.  
Russell could not come, and at the delay which  
would be thereby occasioned in the settlement of  
his affairs; and said he wished to have them settled,  
while Mrs. Roberts was with him for that purpose.  
And the deceased then said that the deponent  
should write down instructions for Mr. Giles Rus-  
sell to make his will by; and then, addressing  
himself to the deponent, said to him, "Mr. Gill,  
you must write;" or words to that effect. And the  
deponent having then drawn the table, on which  
were pens, ink, and paper, near the foot of the bed,  
the deceased proceeded to give in the presence and  
hearing of this deponent instructions for his will  
by word of mouth to the said Mrs. Fanny Roberts  
from a paper which he held in his hand; and she  
the said Mrs. Roberts, as the deceased gave the said  
instructions, repeated the same to the deponent,  
who in the like order in which the said instructions  
were so given by the deceased and repeated by the  
said Mrs. Roberts took the same down in writing.  
That he does not now remember the said Mrs.

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Roberts having at the time deposed of asked the said deceased who was to be his executor, and the deceased answering that Captain Lawrence should be executor, or executor in trust as articulate ; but he is quite certain that at the time he was in manner hereinbefore described told or instructed to write down or insert the legacy of five hundred pounds to Captain Lawrence he was at the same time told or instructed that the said Captain Lawrence was to be the executor in trust of the deceased's said intended will, as well by the deceased saying so in the deponent's presence and hearing, as by the said Mrs. Roberts repeating the same to the deponent ; and he therefore wrote a memorandum to that effect in the same line, containing the said intended legacy of 500*l.* to Captain Lawrence. And he saith that he was interrupted in the writing the instructions by going to dinner with the said Mrs. Roberts, and by several gentlemen calling to enquire after the deceased : but the said Mrs. Roberts and the deponent went up again to the said deceased in his bed-room after dinner, and after the said gentlemen had left the house, to finish the writing the instructions for the deceased's will, which were proceeded with and finished by the deponent ; and, when he had finished them, he read them all over to the deceased in the presence of Mrs. Roberts, who expressed his full approbation of the same, and said it would do very well."

The account thus given by Mr. Gill is in its general substance confirmed by Mrs. Roberts, as far as she was present ; and there is no reason to

doubt the truth and correctness of this relation, or the full testamentary capacity of the deceased ; for though he was agitated, hurried, and irritated, he perfectly well knew what he was about, and dictated these long instructions:—it is impossible then to doubt that this paper, as far as it goes, contains the last intentions of the deceased,—or that when he dictated these legacies he intended the several persons named to take benefit to this extent:—he confirmed these intentions by signing his name, which he was most anxious to do ; he was fearful that he should not live to complete the act.—It is true the deceased did not intend this paper to be his will,—because he hoped to live to make a complete disposition of his property by Russell's assistance : but the act of God intervenes, and the will is prevented by the deceased's death from being drawn and completed.—To contend that this paper cannot operate at all, and is not to have effect as far as it goes, would be to bring into discussion first principles, and to contend against the uniform decisions of this Court as far as its records are preserved and handed down to us.

The question is, whether it is to operate solely—and secondly, if not solely, in conjunction with which will ? whether that of 1804, or that of 1806 ?

The court is of opinion, that it is not to operate solely ;—because it was evidently his intention to have given further instructions ; the instructions were incomplete. According to Fanny Roberts, the deceased only directed some things to be written down,—her impression was that he meant to

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give further instructions on the next morning ;—there are memorandums for enquiries to be made ;—there are no directions respecting the residue—nor whether the legacies were to be diminished or increased in case the property should be too little, or too much :—there are no directions for the disposal of his real property, though it is obvious that he intended to render it subservient to the payment of his legacies ;—he was a good deal hurried also ; and might overlook many persons, even with the assistance of the papers. There are persons benefited by the will of 1804, whom there is no reason to think he would pass over. In short, there is abundant reason to conclude, that though he signed this paper, it was not as a complete disposition of his property ; but to give effect to it as far as it went.

Instructions of this sort, so far as respects the question, whether they are to operate as an entire revocation of a former will, or to be taken in conjunction with it, are very different from the case in which they are finished and delivered over to the drawer of the will, merely to prepare an instrument from them.—It is a rule of the court that unfinished instructions, where there is a complete will, only revoke the complete will as far as they go ;—they are not a codicil to be taken in addition to the will : but revocative as far as they go, and to be taken in conjunction with the will.—The two instruments are to be taken as *containing together* the will of the deceased. If this principle was rightly understood in other courts, there would seldom be much question about cumulative legacies ;—

for where a paper is codicillary, and two legacies are given to the same person, they are cumulative. Where instructions are pronounced for, *as containing together* a will, that is, where there is a complete will, and an instrument intended as the inception of a new will, but not completed, the latter legacy supersedes and revokes the former, and is substituted in the place of it. For these reasons the deceased, here intending an entire new will, and not having completed it, but having proceeded a certain length, I am of opinion that this paper cannot take effect alone, nor as a codicil: but must be pronounced for *together with* a former will.

The question then comes to this, which is the former will? There is no reference in the instructions to Admiral Ingram or Mr. Roberts,—he did not intend that they should have the disposition of his fortune, because he has disposed of it himself;—the inference is that the deceased had wholly abandoned the conditional will, when he set about to make a new will.—There is strong evidence, I think, that the deceased considered the will of 1804 as his operative will at that time, from what he said to Mr. Marsh on the 27th of July. He had been conversing with him for some time respecting the disposition of his property among his relations; and he says, that “he had spoken to the deceased under the impression that he had no other will than that which Admiral Ingram had spoken of at the time hereinbefore deposed of: but the deceased at this period of the conversation said, ‘I have a will by me;’ and, taking up a folded paper in his hand from off the bed in which he lay, consist-

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and
ROBERTS
v.
LAWRENCE.

ing apparently of more than one sheet of paper, said, '*Here it is: if I die, I shall not die without a will; but I want to alter some things in it, as some matters have occurred since which I wish to provide for.*'

This must have referred to the will of 1804. He had not Admiral Ingram's will in his possession: the will of 1804 was in his possession; it did consist of several sheets of paper; it was uncanceled;—his declaration to Betty Bishop is to the same effect, when he told her after Admiral Ingram and Capt. Lawrence had left him on the 26th of July, "I don't know what they see in me, that they are so anxious about my making my will." To which she answered, "It is nothing but right, Sir; you should keep a will by you; you be'ent dead never the sooner, and I hope there is no likelihood of death now." To which he replied, "I have got a will, Betty; but I wish to make some alterations upon the account of my poor relations."

This can only be construed as applying to the will of 1804. The term alteration would not apply to the will of 1806:—the evidence of Gill to the other interrogatory agrees with this.

Here is a direct reference to the will of 1804, and the codicil.—A recognition of it, as the will which by this paper he wished to alter in favour of his poor relations.—These considerations lead to the conclusion that he considered the will of 1804 as his subsisting will.

The remaining important point is whether the condition of 1806 is satisfied? The condition in itself as applied to a whole will is extraordinary. It

does not depend on any particular event, as in case he should fall in action or the like, nor upon any event in his lifetime ; but upon the conduct of some one out of a great number of persons after his death ; and the peculiarity is, that it is not to affect the interests of that individual, but the validity and effect of the whole will.—As far as my observation goes, no case of this sort has ever occurred. Where a condition is to prevent parties from asserting their legal rights, the law does not favour them, even though they affect the individual only who breaks the condition.—When a legacy is given on condition that the legatee shall not litigate the will, the cases cited by the counsel of litigation, where there has been *probabilis causa*, shew that it has been decided to mean only vexatious litigations. Here the person would not only forfeit his own rights, but those of many other persons ;—at the least, the case would require such a condition to be completely and absolutely satisfied.—What has been done here ? and how have these relations disputed it ? Caveats have been entered ;—these might be for the purpose of protecting the will of 1804, instead of disputing it ;—but it is said, the proctor on the other side declared he opposed all the papers ;—but this he retracted the next court ; it was made in error, and in doing it he exceeded his proxy ;—the court cannot consider this act as such a disputing of the will of 1804 as satisfied the condition of the will of 1806, and destroyed the rights of all the legatees under the former will.

Upon the whole, I am of opinion that No. 5., as

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Trinity
Term.

INGRAM
v.
STRONG,
and
ROBERTS
v.
LAWRENCE.

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Term.

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STRONG,
and
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v.

LAWRENCE.

far as it goes, must be carried into effect. That paper, however, is only revocatory *pro tanto*, and only to be taken in conjunction with the former will.—I am of opinion also, that the will of 1804, with its codicils, is to be considered as the former will with which No. 5. is to be taken in conjunction.

I pronounce, therefore, for the will and codicils propounded by Mr. Strong and Mr. Roberts, and for paper No. 5. propounded by Capt. Lawrence, as together containing the will of the deceased; and, as Capt. Lawrence is dead, I decree the probate to Mr. Strong and Mr. Roberts.

Trinity
Term,
June 16.

ATKINSON v. LADY ANNE BARNARD.

JUDGMENT.

Sir JOHN NICHOLL.

Residuary legatees, even where there is no prospect of any residue, entitled to an administration *de bonis*, in preference to legatees and annuitants.

This is a question respecting the grant of an administration *de bonis* of Richard Atkinson:—he died in 1785, having made a will, in which he nominated four executors. Probate was taken by all of them—they are all since dead; and Mr. Muir the surviving executor died intestate, having left goods unadministered.—The deceased also appointed several residuary legatees—eight or nine. One of them Mrs. Jane Atkinson now applies for

an administration *de bonis* ; and in the ordinary course she would be entitled : but the grant of it is opposed by Lady Anne Barnard and Mr. Michael Atkinson, who are not residuary legatees, but who are legatees and annuitants. Various circumstances have been gone into, to shew that the estate would be more properly administered by these legatees than by the residuary legatee.—It is said the Court has a discretionary power on this subject ; and certainly the first thing here is to shew that the Court has exercised a discretionary choice in such a case.

Between the widow and a next of kin there are many instances where the Court has set aside the widow, though the ordinary generally gives it the widow. So also between different next of kin and between several residuary legatees, where the parties stand upon an equality of right, the Court frequently exercises a discretion.—But is there any case in which a residuary legatee has been set aside in favour of a mere legatee ? If there is no precedent, I should be unwilling to make one, unless under very extraordinary circumstances.

What is there here to induce me to take this novel step ? What are the special grounds set forth ? It is said the estate is insufficient ; that there is no residue, and consequently that the residuary legatee can have no interest.—If this ground is sufficient, the door will be opened to perpetual applications, and endless litigation, which will bring with it great inconvenience from the delay which must arise in the grant of administrations. The residuary legatee is the testator's choice ;

1815.
Trinity
Term.

ATKINSON
v.
BARNARD.

1815.
Trinity
Term.

ATKINSON
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BARNARD.

he is the next person in his election to the executors. The practice goes along with that preference. The case of *Thomas v. Butler in Ventris* (a) is a strong confirmation of the modern rule. But in the present case this ground is done away by another consideration: here the residuary legatees are legatees also and annuitants under the will; it is impossible to say they have no interest in making the best of the estate;—it happens also that there are eight other annuitants and legatees;—who also are residuary legatees, and entitled to a preference over the mere legatee,—they do not resist the grant to Mrs. Jane Atkinson;—but Mr. Clayton is confided in by them;—and I cannot consider that by not appearing they concur in the appointment to Mrs. Jane Atkinson.

It is objected that Mrs. Jane Atkinson resides at a distance, and is a spinster: but really these objections are ludicrous.

Another objection made is that the executors have misconducted themselves; that they have not paid the legacies, and that they have done this by the advice and under the management of Mr. Clayton their solicitor, and that Mr. Clayton is intended to be employed by Mrs. Jane Atkinson,—he also is a mortgagee in possession of certain estates at Jamaica, and the brother-in-law of George Atkinson, one of the executors, who was acting trustee and executor under his guidance and direction; and that he never for twenty years made any settlement of his accounts.—If the Court had

(a) *Thomas v. Butler*, 1 *Ventris*, 217.

any choice, how could it be expected to govern itself by such collateral considerations?—If the maladministration of the executors is any ground, and the fact is denied, before the Court can give credit to it, it must enter into an investigation and examination of all the parts of the transaction; and the Court must do this in common justice before it affixes a stigma on the conduct and memories of the executor:—this cannot be the province of this Court,—in an attempt so novel, which would go to set aside a residuary legatee who has not acted in unity or conjunction with either of the executors.—Supposing however that Mr. Clayton will in effect have the management of the property, as may possibly be the case; certainly before I set aside Mrs. Jane Atkinson on that ground, and put the administration into another channel, I should be bound in justice to go into an examination of this whole transaction;—and a suit in this Court merely to decide who is to administer would become as long as a suit in Chancery to settle all the intricate concerns of this estate. These accounts and intricate concerns can only be adjusted in a Court of Equity,—indeed there they now are, and only wait till there is a representation which has been hitherto delayed by an opposition to the usual course of practice in this Court.

Lady Anne Bernard and Mr. Michael Atkinson, as legatees and annuitants, must have the means of calling Mr. Clayton to an account, without being possessed of the administration.—The Court of Chancery is alone competent to settle this,—it is said this could be done more advantageously by

1815.
Trinity
Term.

ATKINSON
v.
BERNARD.

1815.
Trinity
Term.

ATKINSON
v.
BARNARD.

the administrator; if so, it would be more disadvantageous to the other party, and this would depend on the question of mal-administration.

I see no ground for this step;—Mrs. Jane Atkinson is entitled to this administration; if she employ an improper solicitor, she is accountable for it.—I cannot presume that she will not do her duty: I cannot supersede her right.—She is entitled to it by the uniform practice of the court; and to her I shall grant it.

Costs being prayed.

Per Curiam.

The court certainly does not wish to countenance experiments against the usual practice—but I rather wish the parties would not press for costs in the present instance; it is a complicated property, and of great magnitude.

ARCHES COURT OF CANTERBURY.

BAYARD, falsely called MORPHEW, v. MORPHEW.

*By Letters of Request from the Commissary of
Surry.*

1815.
*Trinity
Term,
June 17.*

MARTHA BAYARD, widow, was on the 14th October, 1809, married by licence, granted under the seal of the archbishop of Canterbury, to John Le Poer Morpew, in the parish-church of St. George's, Hanover-square. In Easter term 1815, she instituted a suit against her reputed husband for nullity of marriage, on the ground that he had on the 28th May, 1805, intermarried with Isabella Armstrong, who was still alive.

Nullity of marriage, by reason of a former marriage, established.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit of nullity by reason of a former marriage; it has been objected that there should have been more evidence. The question for the court to consider is, whether the evidence is sufficient. Both marriages were solemnized by the names of Charles Morpew. The party has other

1815.

*Trinity**Term*

BAYARD

v.

MORPHEW.

names, Le Poer and John. This is of no farther consequence than as it might affect the identity—of which, however, from the other evidence, there is no doubt.

Mr. Morphey is an officer in the engineers. The first marriage is proved by the clergyman who married him, and who identifies his person, having seen him at Bow-street, on a charge of bigamy; on which occasion he acknowledged his marriage with Martha Bayard. He also proves that his former wife was then living; for he went with the Bow-street officer, and conversed with her, and was satisfied she was the person he had married;—thus she is shewn to have been living in 1810. The second marriage is proved by the entry to have been in 1809, and by a person who prepared the settlement, and was present at the marriage, and signed the entry. He also proves a deed of separation with his first wife in 1810, after the second marriage; he therefore shews her to be living after the second marriage.—The husband also acknowledged this by entering into the deed of separation.

The court is under the necessity of pronouncing this marriage to be void.

PREROGATIVE COURT OF CANTERBURY.

SUTTON v. DRAX.

1815.
Trinity
Term,
June 21.*PER Curiam.*

Where a legatee propounds a paper and establishes it, thereby fulfilling the duty of the executor, the legatee is entitled to have his expences paid out of the estate of the deceased.—This is the rule of the court.

A legatee entitled to have his expences paid, when he establishes a paper.

PASKE v. OLLAT.

1815.
Michaelmas
Term,
Nov. 15.

JUDGMENT.

Sir JOHN NICHOLL.

There is no difficulty whatever in the decision of this case; but a feature occurs in it of a nature that I cannot pass over without notice.—The writer of the will, who was the deceased's attorney, is himself benefited under it to a considerable amount. The Court is always extremely

Where a legatee is the writer of his own legacy, more than ordinary proof of the authenticity of the will is called for.

1815.
Michaelmas
Term.

PASKE
v.
OLLAT.

jealous of a circumstance of this nature. By the Roman Law (a) *Qui se scripsit hæredem* could take no benefit under a will. By the law of England this is not the case: but the law of England requires, in all instances of the sort, that the proof should be clear and decisive;—the balance must not be left *in equilibrio*; the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper. In ordinary cases this is not necessary; but where the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person;—propriety and delicacy would infer that he should not conduct the transaction; and *à fortiori* in a case where he is the confidential attorney of the deceased;—and where the benefit conferred is to a considerable amount.

The presumption and *onus probandi* are against the instrument: but as the law does not render such an act invalid, the Court has only to require strict proof:—and the *onus* of proof may be increased by circumstances; such as, unbounded confidence in the drawer of the will;—extreme debility in the testator;—clandestinity;—and other circumstances which may increase the presumption even so much as to be conclusive against the instrument. In the absence however, of any circumstances of this sort, the demands of law may be more easily satisfied.

These are the principles and rules handed down

(a) Dig. lib. 34. s. 8.

to me by my predecessors ; and, though I have no difficulty as to the proof in this case,—yet the feature is of a sort that I was unwilling to pass over without notice. The execution here is attested by two witnesses, and a solicitor, who all depose without the slightest hesitation as to capacity—there is no concealment whatever :—Mr. Golding openly before the witnesses refused to attest the will, because he was benefited under it. Every possible degree of caution was observed : the sister of Mr. Golding has also been examined ;—she proves a complete case, that she heard the instructions, that they originated with the deceased, and were a surprise upon the drawer of the will ;—that he proposed another solicitor ; but the deceased refused to attend to this suggestion. A very careful reading over is proved.

Upon the whole of this case I have not the least doubt whatever of the perfect capacity and free-agency of the deceased ; and I am bound, therefore, to pronounce for this will.

1815.
Michaelmas
Term.

PASKE
v.
OLLAT.

LANGMEAD v. LEWIS.

Michaelmas
Term,
Nov. 22.

AN application was made to the Court to direct a monition against an attorney who refused to deliver a paper which was in his possession, and which it was supposed might be of a testamentary nature.

Papers which
may be of a
testamentary
nature not to
be withheld
from the
court.

1815.
Michaelmas
Term.



LANGMEAD
v.
LEWIS.

This was objected to on the ground that it was a paper which had never been seen by the deceased.

Per Curiam.

There is a possibility nevertheless that the paper may be of a testamentary nature ; it may contain instructions drawn up in the lifetime of the deceased ;—it must be produced.

The monition was decreed.

CONSISTORY COURT OF LONDON

1815.
Michaelmas
Term,
Dec. 12.

DRONEY, falsely called ARCHER, v. ARCHER.

ANNE DRONEY, the illegitimate daughter of John Droney and Hannah Burn, was married by licence to John William Archer, in the parish church of Sculcoates, on the 25th of June, 1808. The licence was obtained on the oath of John William Archer; and it stated that both the parties about to be married were of the age of twenty-one years and upwards.

The marriage of an illegitimate minor, without the consent of a guardian appointed by the High Court of Chancery, annulled.

In May, 1815, the woman instituted a cause of nullity of marriage, on the alleged ground of her having been a minor at the time the marriage was solemnized.

A libel was given in on her part, and several witnesses were examined in verification of it.

Lushington and Meyrick, in support of the nullity.

Phillimore contra contended,

That the proof of the minority was not sufficient; and that the Court had a right to the strictest proof, when called upon to annul a marriage after a cohabitation of seven years.

1815.

*Michaelmas
Term.*DRONEY
v.
ARCHER.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a proceeding by Ann Droney against John William Archer for a nullity of marriage under the marriage act.

It is a just observation that the Court has less dissatisfaction in applying the provisions of this act in a case of this description, than in one where the party who institutes the suit has obtained the licence by his own perjury. The mother proves the birth and illegitimacy of Anne Droney. It has been held by (a) this Court, and the Court of King's Bench, (b) that the consent of a guardian (c)

(a) The leading case on this point was that of *Horne v. Eddiard*, Consistory Court of London, Easter Term, 1799: it has been reported by Dr. Croka.

(b) *Priestley v. Hughes*, 11 East. 1.

(c) The Court of Arches has in many instances sanctioned the principle of these decisions. Several cases to the same effect have also been determined in the other Ecclesiastical Courts.

The following case was decided on the 24th of November, 1814, in the Court of the Dean and Chapter of Westminster.

Clarke, falsely called *Hankin*, v. *Hankin*.

The marriage of an illegitimate minor, without the consent of a guardian appointed by the High Court of Chancery, annulled.

John Hankin married Mary Clarke, the natural daughter of Mary Clarke and Thomas Buck, on the 24th of November, 1805, with the consent of her mother. She was a minor, rather more than twenty years of age. Her mother subsequently intermarried with her putative father. In 1814 Mary Clarke instituted a suit of nullity on account of her minority at the time the marriage was solemnized.

Her father and mother were both produced as witnesses, and gave evidence as to the illegitimacy of their child, and also to their both being present, and consenting to her marriage with Hankin.

Dr. Burnaby and Dr. Phillimore were counsel for Mary Clarke.

appointed by the High Court of Chancery is essential to the marriage of an illegitimate minor.

1816.
Michaelmas
Term.

DROWEY
v.
ANDERSON.

Hankin had neither proctor nor counsel: he appeared in Court himself, but gave no opposition to the sentence.

JUDGMENT.

DR. SWABBY.

This is a suit for nullity of marriage, grounded on the minority of the wife. She was an illegitimate child, and married during her minority with the consent of her mother. The law applicable to this case is founded on a statute usually termed the marriage act, which is now a part of the matrimonial law of the kingdom. The interpretation put upon the eleventh clause of the marriage act has been to require the consent not only of the natural, but also of the lawful, guardians. The form of the affidavit, which leads marriage licences, I have reason to know was settled with great advantage, and the consideration of persons of the greatest eminence both in the Civil and Common Law. This appears from a manuscript note of Sir Edward Simpson in my possession; and from that time it has been the practice of the Court of Chancery to appoint guardians to illegitimate minors for the purpose of consenting to their marriages.

The legal and judicial construction of this clause was first given by Sir W. Scott, in the case of *Horner v. Liddiard*; and I agree in every ground which is laid down in that sentence, and in the conclusion of it; especially in that part in which it states that the consent required as essentially necessary to the marriage of illegitimate children can only be given by guardians appointed by the High Court of Chancery.

I should have felt some difficulty here as counsel only appear on one side, if a case so exactly similar to this as that of *Horner v. Liddiard* is had not been fully discussed in solemn argument, and was in print, and accessible to every one.

No proctor either appears for Mr. Hankin, which is extremely unusual—indeed I do not remember a similar occurrence. The husband has offered no defensive matter, and the

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Michaelmas
Term.

DRONEY

v.

ARCHER.

The daughter is stated by the mother to have been born in Nov. 1790. That the child was taken by her sister to the church of the Holy Trinity in Hull, to be baptized six weeks after her birth. That she was not present : but John Droney the father was, and that he and the sister are both dead. An exhibit of the entry of the birth has been produced corresponding in point of date : but it certainly appears very incorrect. It has been contended in argument that the incorrectness is such as to invalidate the evidence of the time of the birth. Un-

cause comes on entirely on the pleadings and proofs adduced by the wife,—but it is so far satisfactory that it does not appear that, if Mr. Hankin had appeared by counsel and proctor, he could have repelled the legal effect of the proofs.

The illegitimacy is proved by the best evidence, that of the father and mother of the illegitimate child. She was a minor just turned twenty at the time of her marriage. I chose rather to have other evidence respecting the search that had been made in the Court of Chancery as to the circumstance of the minor having had no guardian appointed by that Court, and rescinded the conclusion of the cause in order that the officer of the Court might make search there also.

Upon the whole the evidence fully satisfies the exigencies of the law as applied to the facts of the case. As well therefore upon the authority of that case solemnly argued and judicially determined, as upon the construction I myself should have put upon the clause in the act of parliament, I pronounce a declaratory sentence of nullity ; and cannot deny to afford the party the remedy to which the law entitles her.

The Court afterwards told Hankin, he might appeal if he was dissatisfied with the sentence ; and recommended him, if he did, to apply to a proctor in order that he might take the proper steps correctly.

questionably it is evidence of great importance; the Court always expects it: it is a testimony of a very high nature, but the cause may be supported by other evidence. The entry is "Anne, daughter of Thomas Drawnay." The man's name was not Drawnay or Thomas. It appears, however, that he was frequently called Drawnay. The mistake of the Christian name is less satisfactorily accounted for; we must recollect, however, that in populous towns many children are brought to be baptized together;—some confusion occurs; and an error of this nature might arise, which perhaps in the case of the illegitimate child of an obscure person might not be attended to. With all its incorrectness, the entry does probably apply to this person: but at all events, the mother, sister, and two other persons, speak with considerable confidence as to her age.

The marriage was in June, 1808,—She could not then be more than 18; hardly so much.—This case, therefore, turns on the fact whether there was any consent to the marriage. The records of the Court of Chancery have been examined with the usual care to ascertain whether any guardian was appointed; and, indeed, from the situation of the parents, it was not likely that any should have been. I think there is proof of the want of consent required by the act of Parliament, and that this marriage is invalid.

1815.
Michaelmas
Term.
~
DRONEY
v.
ARCHER.

PREROGATIVE COURT OF CANTERBURY.

1816.
Hilary
Term.
Jun. 31.

RYAN v. RYAN.

Administration granted to a second wife, the first having been divorced *à vinculo* by a royal ordinance in Denmark, the parties divorced being both Danish subjects.

PHILIP RYAN, an Irishman by birth but for many years domiciled in Denmark, and a resident in the city of Copenhagen, died in London in June, 1808, leaving a widow and an infant daughter by her, and three daughters the offspring of a former marriage.

It appeared that on the 3rd of September, 1803, he had entered into a contract of separation with his first wife; and that on the 25th of March, 1807, his marriage was entirely dissolved, and permission given to the parties to marry again by an ordinance under the hand and seal of his Danish Majesty. On the 5th of June following he executed a contract of marriage with Elizabeth Ferrall, a native of St. Croix, and the daughter of an Irish physician domiciled at Copenhagen. This contract was subject to the confirmation which it afterwards received of the king of Denmark: and the marriage was subsequently had under the authority of a royal licence dispensing

with the publication of banns, and the solemnization of it in a church.

Philip Ryan died intestate, (at least an instrument of a testamentary nature which he left behind him was admitted to be invalid,) and shortly after his death, viz. on 28th June, 1808, the person to whom he was last married applied to the Prerogative Court of Canterbury in the character of his lawful widow and relict for letters of administration to his goods, chattels, &c. The three daughters of the former marriage, who were minors, appeared by James Ryan their uncle and guardian, and denied the interest of the widow.

The proceedings in the cause were delayed; first, by the war which broke out between Great Britain and Denmark, and afterwards by the absence of some of the parties beyond sea.

Adams and Lushington for Mrs. Ryan.

The question is whether, because marriage is indissoluble by the law of England, it is also so by the law of Denmark. The act of the Danish king is of the same force as an act of Parliament in this country. He unites in his person both the legislative and the executive functions. It was shewn, in *Harford v. Morris*, that the crown of Denmark had power to make any laws it pleased. The law of England looks only to the *lex loci contractus*.

No counsel appeared on the other side.

JUDGMENT.

Sir JOHN NICHOLL.

I think this Court ought not to make any further difficulties in a case in which the widow and children of the deceased are parties;—the interest

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*Hilary
Term.*

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v.
RYAN.

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Hilary
Term.



RYAN
v.
RYAN.

of the widow was denied—she has propounded it, and I think established it according to the law of Denmark ;—though there was a former marriage, it appears by the evidence of the Danish lawyers, that a divorce by the king of Denmark is a divorce *à vinculo matrimonii*,—and that such a dissolution of an existing marriage, is good.

Under the circumstances of this case I think the proofs sufficient, the parties being both domiciled in Denmark, and both contracted in that country—whether they would have been sufficient in a matrimonial cause it is not necessary to decide ; but, on the mere question whether the widow shall take out the administration, *semper præsumitur pro matrimonio* ;—The parties, who opposed the widow at first, have now withdrawn their opposition. I pronounce for her interest, guarding myself against its operating in the same way in a matrimonial cause, where both the burthen and the nature of the proof is different—with these cautions and limitations I pronounce for the interest of the widow.

ARCHES COURT OF CANTERBURY,

1816.
Hilary Term,
Feb. 3.

CLARKE and CLARKE v. DOUCE and EAGLETON.

ROBERT Clarke and Sarah his wife libelled Francis Hubble Douce and Benjamin Eagleton, the executors of the will of Samuel Hallett of West Malling in Kent, for withholding from them legacies bequeathed to them respectively by the deceased.

A suit for a legacy brought by legatees against an executor. The demand not substantiated.

The libel pleaded that Samuel Hallett bequeathed to Francis Hubble Douce and Benjamin Eagleton the sum of 3,300*l.*, among other things to pay the dividends of 400*l.*, residue of the said trust money, to his sister Sarah Clarke and her assigns, or to permit and suffer her or them to take the same for her and their use during her life.

That he also bequeathed to his brother-in-law Robert Clarke the sum of 100*l.* by a codicil to his will.

That the executors had often been applied to for payment of the above-mentioned legacies, but had refused to pay the same.

In reply to this libel the executors answered that "Samuel Hallett in his lifetime sold a freehold estate, in which Sarah Hallett his then wife, and

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Term.*CLARKE
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and
EAGLETON.

now widow, had a claim of dower;—that the deceased gave his bond to the purchaser of the said estate indemnifying him against such claim of dower;—that after his death Sarah Hallett having at the instigation of Robert Clarke claimed her dower in the said freehold estate, the purchaser thereof called on these respondents as executors of the said deceased to indemnify him from such claim pursuant to the bond of the deceased;—that the residue of the personal estate of the deceased not being sufficient to satisfy the bond, and the respondents being advised by Mr. Bell, an eminent chancery counsel, that the legatees and annuitants named in the said will should abate proportionally to make good the deficiency, it was then proposed and agreed by the respondents and the solicitor for the said Sarah Hallett that the estate should be valued by two surveyors; and in conformity with the said agreement the surveyors valued the estate clear of land-tax at 83*l.* per annum. The dower of Sarah Hallett therein, according to the custom of Kent, was 41*l.* 10*s.*—That they then convened a meeting of the legatees and annuitants on the 19th of October, 1812, to acquaint them with the claim of dower so made by the deceased's widow, and the opinion of chancery counsel thereon, and of the aforesaid valuation; at which meeting Robert Clarke attended on the part of himself and his said wife, when the valuation aforesaid was approved of; and it was agreed by the deceased's widow, legatees, annuitants, and executors, the said Robert Clarke not opposing the same, that the interest of a sum of money equal to the dower of

the said Sarah Hallett therein should be paid to her for her life or widowhood, and that a sufficient principal sum to produce such interest should be invested in the 3 per cent reduced annuities in consequence of which she was to release her dower to the estate, and thereby enable the respondents to fulfil the bond given by the said deceased as aforesaid. That for such purpose it became necessary to purchase 1383*l.* 6*s.* 8*d.* Stock in the 3 per cent reduced bank annuities to produce the sum of 41*l.* 10*s.* per annum. That, if the said claim of dower had not been made, the residue of the said deceased's personal estate would have amounted to 209*l.*; and it required the further sum of 621*l.* to purchase the said 1383*l.* 6*s.* 8*d.*; and which sum of stock these respondents accordingly purchased in their own names as executors for the sum of 830*l.* That a proportionable part of the said sum of 621*l.* 0*s.* 0*d.* was deducted from each annuity and legacy. That the amount of the principal money of such annuities and legacies being 4950*l.* a deduction after the rate of 12*l.* 11*s.* per cent, was made from them, which took from the principal money producing the annuity bequeathed to the said Sarah Clarke the sum of 50*l.* 4*s.* and from the legacy bequeathed to the said Robert Clarke the sum of 12*l.* 15*s.* That the said sum of 1383*l.* 6*s.* 8*d.* stock so remaining in the names of the executors, or so much of it as may be necessary to replace the sums respectively abated from the said legacies, will be to be sold out and the proceeds thereof distributed among the legatees and annuitants at the death of the said Mrs. Hallett

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and these respondents further answer and say that a deed of trust was prepared by counsel for the legatees and annuitants to sign to testify their approbation of the investment of the said 1383*l.* 6*s.* 8*d.* in the 3 per cent reduced annuities, and to declare the trusts thereof. That some of the legatees having consulted with Mr. Hart, an eminent counsel at the Chancery Bar, were advised that the said arrangement was perfectly correct and equitable. That a draft of the said deeds was submitted to Mr. Simmons of Rochester as Solicitor for the said Robert Clarke and Sarah his wife, to peruse on their behalf, who approved thereof. And the same was ingrossed, and hath since been executed by the said Sarah Hallett the deceased's widow, by these respondents and by all the legatees, and the annuitants under the will of the said deceased; except the said Robert and Sarah Clarke who refused to execute the same, and except Thomas Sanders and Edward Eagleton who have not attained the age of twenty-one years. That all the other legatees and annuitants have been paid by these respondents their respective legacies and annuities (the aforesaid deduction being made therefrom); and these respondents have frequently and earnestly endeavoured to prevail on the said Robert Clarke and Sarah Clarke to take their annuity and legacy subject to the aforesaid deductions but that they always refused to accept them."

No witnesses were examined on either side.

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit for a legacy brought by a legatee

against the executors under the will of William Hallett. A libel has been given in, and answers have been taken to that libel.—No witnesses have been examined, but the answers have been read; and it is only from the admissions contained in these answers, that the Court can take the facts of the case. I cannot go out of them to hear the statement of other facts.

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I think the parties have imposed an unpleasant task on their counsel, to account for their coming into a Court at all; for it does not appear that the executors have refused them payment of their legacies; they seem to have done all that is proper.

The deceased by his will left 3,500*l.* to his executors, in trust to pay certain annuities to Sarah Clarke. Probably there might be some doubt how far this Court could enforce the payment of such an annuity: but there is 100*l.* bequeathed to Mr. Clarke, on which there can be no doubt that this Court has jurisdiction. The legatees demand payment of the whole of their legacies. The executors state that the assets would have been sufficient to have paid the whole if there had not been demands against the estate. The deceased had sold an estate, and given a bond of 1000*l.* to the purchaser to indemnify him against any claim his wife might have for dower. The wife had claimed dower, and the executors had been advised that she had a right to it. Instead of paying the penalty of the bond, the executors had set apart a sum to pay the wife an annuity in lieu of dower, which is admitted to be the best arrangement that could be made for the estate:

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this however has created a deficiency in the estate of $12\frac{1}{2}$ per cent. on the legacies for the present. The legatees plead that they have demanded their legacies, but have been refused: whereas the executors state in their answers that they have been offered their legacies over and over again subject to the deductions to which I have alluded, and that they have refused to take them. I am at a loss to conceive why they should have sued for this legacy? If the answers are not correct, or redundant, they should have objected to them, or pleaded themselves; they should not have brought the case before the Court upon them. The Court must take the statement as true. The executors state that they have consulted with three different solicitors of the parties; and that no objection was made, no exception taken on their behalf to the proposed arrangement; and yet the executors are dragged before the Court in an extremely vexatious suit.

I must pronounce that the parties have failed in proof of the libel by demanding the whole legacy, as it is shewn that no more is now due than has been offered. I can only pronounce that the legacy is due subject to the deduction:—and I think I do not do justice if I do not give the executors their costs;—if costs were given out of the estate they would fall on the other legatees, as they would be further deducted from their legacies.

Costs given.

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AGG v. DAVIES, falsely calling herself Agg.

JOHN AGG was married to Jane Davies at Swansea, on the 1st of February, 1806. The licence was obtained upon his affidavit, in which he stated no particulars as to the age of either party; but generally that there was no impediment to the marriage. In 1814 he instituted proceedings against her in a cause of nullity of marriage on account of her minority—his libel pleaded that she was born on the 17th of May, 1785; that she was baptized at home; that there was no entry of her baptism in the parish register—but that an entry was made in a bible which had been copied by her father from a smaller bible in which the entry was originally made by a neighbour. The entry was as follows:—

Nullity of marriage on account of the minority of the wife, not established.

“Jane Davies, the daughter of John Davies, was born on the 17th day of May, at seven o’clock in the morning, 1785.”

John Davies, the father of the party proceeded against, deposed

“That his daughter was born at Swansea, in the year 1785. The month he does not recollect. He was at sea at the time she was born, but returned

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to Swansea a few weeks afterwards. That before his return his child was half-baptized; and named at his house, as he believes, by the minister of St. Mary's parish,—he believes his child was never baptized fully according to the ceremonies of the church of England. On his return to Swansea for a few weeks after his daughter's birth he found an entry of such her birth was made in a small bible of this deponent's, which he was informed by his wife had been made immediately after the child's birth by a neighbour of the name of Eleanor Jones, who has been dead several years; and about eighteen years ago the deceased purchased, at Truro, in Cornwall, a larger bible, and also therein made entries of the births of all his children. He does not know whether there is an entry of the half-baptism of Jane Davies in the register book of baptisms for St. Mary's parish.

“The entry was transcribed by him from the small bible very soon after his return from Truro to Swansea; and was very carefully examined by him with the original entry in the smaller bible, and agreed therewith: but where the smaller bible is, he does not know.

“That his daughter, Jane Davies, married John Agg in February, 1806, by virtue of a licence—that she was then a spinster, and under age;—that such marriage took place in the church of St. Mary, Swansea; but he was at that time at sea on a coasting voyage; and such marriage took place against the consent of this deponent signified to John Agg the night before the deponent went on

such voyage; which consent he then refused to give in consequence of the disapprobation of the father of the said John Agg as expressed in a letter for him to his son, which letter John Agg read to the deponent.

"That he knew John Agg was paying his addresses to his daughter; but he was not privy to, or consenting to the marriage. That he was first acquainted with the marriage at his return to Swansea from a coasting voyage, four or five weeks afterwards, by his wife; but he never after the said marriage declared whether it met with his approbation or had his consent then."

Adams and Lushington for the husband.

Jenner and Dodson, contra.

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit for nullity of marriage by reason of minority brought by the husband after a cohabitation of many years. It does not appear whether there has been any issue; the minority was only of about three months. It is not pretended that there was any disparity of years, or any thing clandestine in the courtship of the parties. The father was asked to give his consent when going on a voyage; and now says he refused not from any dislike of the man, but because the friends of the man did not approve of the marriage.

The licence was obtained on the oath of the man now suing to set aside the marriage. He swore that he knew of no impediment to the marriage; he must therefore have sworn either that she was of age, or that the consent of the father was obtained.

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It must now be shewn by clear proof that the woman was a minor, and that there was no consent of the father. The marriage was solemnized without any clandestinity. The first cousin of the bride performed the part of the father in giving her away; and he attests the entry of the marriage.

It is usually said that the Court is only ministerial in such cases. When a man has contracted a marriage celebrated under a licence obtained by his own perjury, and comes to have that marriage set aside, even after several years' cohabitation, it appears at first sight quite revolting that a suit should be entertained, but it has been held, and properly held, that the public has an interest in having the situation of the parties ascertained, and that the Court has only to pronounce for the nullity:—still the proof must be clear, and almost irresistible.

How stand the proofs in this case? There is something of doubt and difficulty thrown on the proofs by the delay which has taken place in the cause. The appearance for the party cited was given on the first session of Easter Term, 1814; the libel was given on the first session of Michaelmas Term, 1814. No witness was examined for a year afterwards;—a commission issued in January 1815; witnesses were not examined till January 1816. The marriage is proved to have been solemnized on the 1st of February, 1806, as pleaded—the entry in the register is proved by Rawlins, who gave her away; but to shew the marriage to be invalid, it is alleged that the woman was born on the 17th of May, 1785, thus wanting little more than three

months of being of age, and that there was no consent of her father. Agg, in the affidavit on which he obtained the licence, swore he knew of no impediment from consanguinity or otherwise to the marriage; and the inference from this must be that he understood her to be of age, or that her father was consenting. He must have been then satisfied that he was going to contract a legal marriage. The Court cannot presume him to have been ignorant of the law.

The first proof of the age is usually the entry of the baptism; though this is not absolute proof of the exact birth, yet from the general use of infant baptism in this country it is strong adminicular evidence in proof of minority;—the register is a public record;—it fixes necessarily the time when the entry was made, and is something to resort to by which parties are enabled to swear to the exact age. The absence of this proof is a most important defect, and it is not alleged that the parties are Dissenters;—the fact is pleaded in the libel that there was no entry;—How is this proved? A witness searches the registers for 1785, and for some *subsequent* years. Does this prove no entry? It proves that there was none in 1785, or subsequently; but this does not prove there was no entry. This is consistent with the woman's having attained her majority;—her baptism may be registered in 1784, and then the marriage would be valid. It would be most dangerous if the Court were to pronounce on such evidence;—and where there has been a fact of marriage the presumption of law is strong in favour of the act; at any rate

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it is necessary to shew that there is no entry of baptism before they attempt the subsidiary evidence.—A family bible is introduced;—and there is an entry of the birth in it;—it is not an original entry, but the copy of an original entry stated to have been made by the father. This is going a step further than I recollect to have been received;—if it had been the practice of the father to enter the births at the time they occurred, and this had been that entry, it would be very important;—but it was not made till many years afterwards. This bible was not printed till 1793. If the entry was made in error, it not only proves nothing, but it may have laid the foundation of error in all the parole evidence which has been given in the cause.

It is pleaded, there was another small bible, since lost, in which it was the custom of the father to make entries;—to this the mother and sister of the woman depose, following the terms of the plea;—but the father says the entry was made by Eleanor Jones, a neighbour, who is since dead. If, therefore, the original had been before the Court, it was not made by one of the family; and there would be no security against ignorance, error, or fraud. But, supposing the original to have been correctly made, what reliance has the Court on the exactness of the copy? The man was of a low condition in life,—the mate of a coasting vessel;—seamen are not accurate:—the transcript was not made till many years afterwards;—in transcribing, a mistake in the year might easily be made either in the reading or the writ-

ing. The very next entry has a mistake ;—the year has been erased, and 1790 has been written over other figures, which shews how little reliance is to be placed on a transcript made by ignorant persons of this kind.

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In a case of this description I am led to inquire whether there might not be some inducement to make the eldest daughter appear younger than she really is ;—the credit of the wife might make it necessary :—if there might be inducements, that circumstance alone would be sufficient not to allow the Court to rely on a mere entry of this sort. This book seems to make no evidence either in form or substance, as to the birth ; but it may have laid the foundation of error in all the parole evidence ;—all the witnesses may have fixed the birth in 1785, from this entry.

Under this consideration the Court would require that witnesses, speaking at the distance of thirty years, should assign a reason for remembering the fact to have happened in that particular year. Many persons mistake the year in which they were born, and the year in which their children were born. This observation applies more strongly to the lower class of people ;—they seem only to recollect a particular year by connecting it with some other event.

Mrs. Rawlins speaks of visiting the mother in the year in which the child was born, from having a son of her own born in the same year ; she deposes after the lapse of thirty years, to the first, or second of June being the day on which she went, which precision rather takes from her credit :

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—but how does she fix it to the year 1785, and not 1784? She does not say her own son was born in that year, for that she has recently examined the register of his birth, or any fact on which she founds it:—no reason is given;—she may have taken the year from the entry in the book before the Court.

So the father and mother may be exact as to the month, but they give no reason for fixing the year;—if they had said they were married in 1784, or that they took their house in that year, and had lately referred to the lease of it, or some circumstance enabling them precisely to fix the date, it might be something to satisfy the Court;—but I am left in doubt,—there is not that precise and satisfactory proof which convinces the Court that the minority of the woman is established.

But then, another essential part of the case, *viz.* the want of consent, stands on the dry uncorroborated account of the father. The evidence given by the nephew is contradicted by his own act in giving the woman away. What says the father himself? That his consent was asked, but he refused because the father of the man disapproved of the connexion;—the marriage was had when he was absent at sea. He admits that he knew of the courtship,—he does not say he disapproved of the connexion;—it was only because the man's friends disapproved that he did not give his formal consent;—he does not order the man to break off the connexion;—he does not leave instructions with his wife to prevent the marriage;—it is quite consistent with this evidence that he might have told Agg if he could get the

consent of his friends, he would not object ; or he might have left authority to this effect with his wife ;—and I think such a conditional consent would have been sufficient ;—and I am warranted in supposing there was something of this kind from the conduct of all the parties. The marriage was not clandestinely had ;—it was in their own parish church,—her cousin gave her away,—and there is every reason to infer it was validly contracted.

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It would be extremely dangerous on such evidence of the father's, to say the marriage should be dissolved. The father and mother may have their reasons for wishing it dissolved. The Court, in taking so important a step as this, must look to the possibility of improper views ;—it must be upon its guard, especially from the want of the usual evidence. It usually has the father's evidence of want of consent, if produced, corroborated by other circumstances, such as his forbidding the courtship, his expressing surprise and regret at hearing of the marriage, and the like ;—and what makes the omission more extraordinary in this case is, that the mother has been produced, but has not been examined to the marriage and dissent of the father. This throws an additional cloud of suspicion over the case, and leaves it open to the suggestion that there might have been a previous or conditional consent on the part of the father.

On both these points the evidence is not satisfactory to my mind ;—the presumption is strong in

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favour of the marriage. The man swore he knew of no impediment ;—the parties act as if there was none ;—they have cohabited for many years. I feel myself called upon to pronounce that the party has failed in proof of the libel, and I dismiss the suit.

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## PREROGATIVE COURT OF CANTERBURY.

SIKES and BRODERICK v. SNAITH.

1816.  
*Hilary*  
*Term,*  
*Feb. 26.*

ON the 14th of February, 1816, Westgarth Snaith, Esq., a banker in Mansion House Street, being very ill, sent for Mr. Walton, his solicitor, into his bed-room, and gave him detailed instructions for making his will. Mr. Walton retired into another room, where Mr. Joshua Watson, Mr. Snaith's brother-in-law, was ; and immediately, in his presence, committed to writing the heads or substance of the instructions which he had received, and then proceeded to draw up a will from them ;—when he had finished it, he desired Mr. Watson to inform Mr. Snaith that the will was ready for execution, and to ask him whom he would have for witnesses besides himself. This message being communicated to Mr. Snaith, he desired that two of the clerks in his banking house, whom he named, should be called up for that purpose. They were accordingly sent for ;—and Mr. Walton returned to the bed-room of Mr. Snaith with the intention of reading over the will to him, and seeing it signed and executed ;—when he learnt that the testator had been seized with a violent fit of vomiting, which had reduced him to so languid

An allegation propounding instructions committed to writing during lifetime of the testator, but neither seen by him nor read over to him, admitted to proof.

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and insensible a state as to render him incapable of executing his will, or of doing any rational act. In this state Mr. Snaith continued till his death, which happened within a very few hours from that time.

The will drawn up by Mr. Walton was as follows:—

“ This is the last will and testament of me  
“ Westgarth Snaith, of Mansion-house street,  
“ London, banker. I give and bequeath to  
“ my dear wife Jane Snaith, for her own use  
“ and benefit, my carriage, carriage-horses,  
“ and harness ; and also, all the plate, linen,  
“ china, books, liquors, (except wines,) and  
“ spirits, in either of my houses in Mansion-  
“ house street, or Woodhouse, in the parish  
“ of Wanstead, Essex ; Together with the  
“ use, free of taxes and outgoings, for the  
“ period of two years from my decease, of  
“ my freehold and copyhold house, lands, and  
“ premises at Wanstead aforesaid, (our resi-  
“ dence,) with the use of the live and dead  
“ stock there. And after the expiration of  
“ such two years, the same to be sold by my  
“ executors and trustees, and the net produce  
“ carried to the account of the residuum of  
“ my estate and effects. I give and bequeath  
“ to my nephew, Mr. Thomas Wilkinson, all  
“ the household goods and furniture in my  
“ house in Mansion-house street. I give and  
“ bequeath to my esteemed relatives and  
“ friends, Joshua Watson, of Clapton, in the  
“ parish of Hackney, Esquire, the Reverend

" Thomas Sikes, of Guilsboro', in the county  
 " of Northampton, and William Brodrick,  
 " of Gower street, in the county of Middle-  
 " sex, Esquire, the sum of three hundred  
 " pounds sterling, each of them. And I do  
 " hereby nominate and appoint them execu-  
 " tors of this my will, and trustees for the  
 " purposes hereinafter mentioned. And as to  
 " all the rest and residue of my estate and  
 " effects whatsoever, whether freehold, copy-  
 " hold, or personal, I give, devise, and be-  
 " queath the same unto my said executors,  
 " the said Joshua Watson, Thomas Sikes,  
 " and William Brodrick, their heirs, execu-  
 " tors, administrators, and assigns, In trust,  
 " to sell, dispose, collect, and receive, and  
 " to invest the net proceeds thereof in their  
 " names, upon government stocks and funds,  
 " and to pay the income and produce of one  
 " full third part of such my residuary estate  
 " to my said wife during her life. And to pay,  
 " transfer, and divide the principal thereof  
 " after the decease of my said wife to and  
 " equally between such of my children as  
 " shall live to attain the age of twenty-one  
 " years ; and the executors or administrators  
 " of such of them as shall live to attain that  
 " age, and die in the lifetime of their mother.  
 " And as to the remaining two third-parts of  
 " such my residuary estate, In trust to pay,  
 " transfer, and divide the same to and equally  
 " between such of my children as shall live  
 " to attain the age of twenty-one years, on

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“ their respectively attaining that age ; and
 “ during such their minorities respectively,
 “ to pay to my said wife the *income* and *pro-*
 “ *duce* of each child’s share, she continuing
 “ to maintain and educate them. And in case
 “ of her decease during any child’s minority,
 “ In trust, to pay and apply the income and
 “ produce of each minor child’s share, or a
 “ competent part thereof, at the discretion of
 “ my said executors and trustees, for or to-
 “ wards her maintenance, board, and educa-
 “ tion ; and to invest the surplus, if any, of
 “ such income and produce, to accumulate
 “ for her use till she attains the age of
 “ twenty-one years. In witness whereof I
 “ have hereunto set my hand and seal this
 “ fourteenth day of February, One thousand
 “ eight hundred and sixteen.

L. S.

“ Signed, sealed, published, and declared
 “ by the said testator Westgarth Snaith,
 “ as and for his last will and testament, in
 “ the presence of us, who in his presence,
 “ at his request, and in the presence of
 “ each other, have subscribed our names
 “ as witnesses, the several interlineations
 “ and obliterations, opposite to which the
 “ initials of our names are set, being first
 “ made.”

This paper was propounded in an allegation by
 the executors, and opposed by the widow of the
 deceased.

Jenner and Dodson for the will propounded.

Swadby and Daubeny contra.

In this case the instructions were not read over by Mr. Snaith, or ever seen by him:—there has yet been no case in which the Court has pronounced for instructions which have been neither seen, nor read over by the deceased.

JUDGMENT.

SIR JOHN NICHOLL.

On the point of law that a paper can be pronounced for which had never been seen by the deceased, or read over to him, I have no doubt: this principle was recognized in the case of *Wood v. Wood*, (a) in which all the necessary instructions having been given by the deceased, and reduced into writing in his lifetime, probate was given of so much of the paper as was shewn by evidence to be exactly conformable to the instructions. It is essential that it should be written in the lifetime; otherwise it would be a mere nuncupative will, and then of no effect under the statute. It has been argued that there are here mere heads of instructions committed to writing, and that neither will nor instructions have been read over to the deceased. I do not apprehend that the law requires either one or the other. The doctrine of this Court was laid down in *Bury v. Bury* (b), where instructions were established on satisfactory proof that they had been reduced into writing during the life of the deceased. In *Box v. Wetherby* (c)

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(a) *Wood v. Wood*, Prerog. Micha. Term, 1811. Vol. I. p. 357.

(b) *Bury v. Bury*, Prerog. Hilary Term, 1791.

(c) *Box v. Wetherby*, Prerog. 1804.

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the Court said, "*reading over was only required to shew that the paper was conformable to instructions. Here the evidence leaves no doubt as to the intentions.*"

In this case the drawer of the paper, from his sending to the deceased to know who were to be the witnesses, must have been satisfied that he had received his final instructions ;—two of the clerks out of the banking house were directed to be called up ;—the deceased, before they came, was seized with a fit of vomiting, from which he did not recover, and died within three hours.

This is a proper plea to go to proof in order to see how far the paper is drawn up in conformity with the instructions : it will then become a question of fact whether the will is made according to the directions given.

Easter
Term,
May 1.

The cause came on for hearing the evidence adduced in support of the allegation.

JUDGMENT.

Sir JOHN NICHOLL.

Instructions committed to writing during the lifetime of the testator, but never seen by him, or read to him established as a will.

The law was fully discussed on the admission of the allegation. I referred, on that occasion, to several cases. I have since taken an opportunity of looking into them ; and I find a series of cases from *Gardner v. Smith* in 1727, in which the principle for has been established that a paper, not written in the presence of, nor read over to, or by the testator, may yet be established upon clear proof, that it was written in his lifetime, and was

drawn up conformably to his instructions, the further completion being prevented by the intervention of incapacity ;—at the same time that the rule of law is clear, it is the duty of the Court to look cautiously into proof of the facts to ascertain that the paper was actually written in the lifetime of the party, and that it was drawn up by his directions. —Now, therefore, I have only to enquire into the mere question of fact whether it is conformable to the intentions of the deceased. There is no doubt but that it was drawn up in his lifetime ;—no doubt of his capacity ;—no doubt of his volition ;—none of the general outline of his intention. The only doubt suggested is, whether there are not some minute and subordinate parts of the will not according to any directions. But if this were so, the Court would direct them to be struck out as not proved ;—from the evidence, however, there can be no doubt whatever as to those parts.

The deceased was dangerously ill; his apothecary advised him to settle his affairs ; Mr. Watson, his brother-in-law, gave him the same advice. His solicitor was sent for, and left alone with him ; and instructions were given him for drawing the will. The subordinate parts, on which doubts were expressed on the admission of the allegation, are very fully explained by the evidence, especially in the answers to the interrogatories. Short memoranda or heads of the instructions were first taken down by the solicitor, and afterwards a will was drawn from them in a more formal shape. The will is merely an arrangement of his property between his widow and daughters ; something different from what

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the law would have made, and suitable to the condition of all parties.

The conduct of the party at the time is a strong corroboration of his impression. Mr. Walton was actually proceeding into the room to have the will signed, when the deceased was seized with a vomiting fit, and never afterwards had capacity to complete it. If the deceased had doubted whether the attorney had completed his wishes, he would have asked questions to that effect: but he was quite prepared and ready to sign the instrument as soon as it could be brought to him. Nothing but the sudden seizure, or, as we term it, the act of God, prevented the execution: if the Court refused to pronounce for this will, it would defeat the final intentions of the deceased. Adhering, as I do, to the rule laid down in all the cases, that the Court must proceed with great caution, I have still no hesitation in pronouncing for the paper.

ARCHES COURT OF CANTERBURY.

The Office of the Judge promoted by
BLACKMORE and THORPE v. BRIDER.

*By Letters of Request from the Commissary of
Chichester.*

1816.
Easter
Term,
April 10.

JOHN BLACKMORE and James Thorpe, the churchwardens of Harting, in the county of Sussex, promoted a cause of office against William Brider for having married and cohabited with Mary Walton, the daughter of his former wife by a former husband. William Brider refusing to appear to the citation taken out against him, and served upon him, was pronounced contumacious, and in contempt; and the decree was signified pursuant to the 53rd of George III. 'All the proceedings were had *in pœnam*;—fourteen articles

An incestuous marriage annulled, and penance enjoined the parties to it.

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Term.

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v.
BRIDER.

were exhibited against him by the churchwardens, and five witnesses were examined upon them.

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit promoted by the churchwardens of Harting, against William Brider, for incest.—It is a criminal suit ; and no appearance being given for the party accused, it is the duty of the Court to examine the evidence scrupulously : but, having so examined the evidence, it appears to me that the proceedings have been regular, and the evidence is full.

The articles charge the man with cohabiting with the daughter of his former wife, and state that he has children by both of them. The suit is very properly brought by the churchwardens in order to put an end to this offensive scandal; the evidence proves the continuance of it ;—and that the parties have persisted in the cohabitation, though they have twice been driven out of the parish by the parish officers ;—these proofs leave no judicial doubt as to the facts, and the law is clear.—The important fact to be proved is, that the woman now cohabiting with Brider is the daughter of his former wife. The articles plead that his former wife had first married Thomas Waller ; and they exhibit the register of that marriage. Her birth and baptism are pleaded, and the register of them is exhibited. The death of Waller is then pleaded, and the marriage of his widow with Brider ;—the register is exhibited, cohabitation is pleaded, and reputation and acknowledgment of each other as husband and wife till his death. It is next shewn

that Brider married Mary Waller, the daughter of his first wife, by Thomas Waller. The register of the marriage is exhibited; and it is pleaded that they are now incestuously cohabiting.

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Five witnesses have been examined.—three of the family;—who prove all the necessary facts. The fourth was present at the second marriage, and proves that she was married to Brider; the fifth speaks to the exhibits. Two brothers of the first wife prove her marriage to Thomas Waller; they were not present. The witnesses present at that marriage are dead; but the register is exhibited, and the brothers depose to cohabitation. This marriage, however, is not so important; for incest would arise equally if the woman was the illegitimate daughter of the wife. They depose that Mary Waller was her daughter, and they say that their sister Anne Waller married Brider;—that their sister died;—that Brider having seduced her daughter, and she being pregnant, they left the parish, got married in another parish, and returned, avowed their marriage, cohabited together, and had children, and still continue to cohabit. This is the general history, and it is confirmed by the sister of Brider who was present at her brother's first marriage. The second marriage is proved by James Brider, who was present at it, and can identify the parties. The entries in the register are proved, and the identity is spoken to by three persons who were perfectly acquainted with the parties;—so that all the facts are proved in such a manner that the Court can have no doubt of them. I must, therefore, pronounce the sentence of the

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law; viz. that the marriage is null and void; and that the parties must do the usual penance, and pay the costs of the suit.

As to the time and circumstances of the penance I wish the precedent in the case of *Cleaver v. Woodridge* (a) to be followed.

The Court accordingly enjoined Brider to perform a public penance (b) in Harting church, on

(a) *Cleaver v. Woodridge*, Arches, 1789,

(b) The following is the sentence signed by the judge in this case. We do pronounce, decree, and declare, that the aforesaid pretended marriage, or rather shew or effigy of marriage, so unduly had and solemnized, or rather profaned between them the said William Brider and Mary Walton, otherwise Waltham, otherwise Brider, to have been incestuous and unlawful; and that the same be dissolved as having been absolutely null and void from the beginning to all intents and purposes in law whatsoever; and that the said William Brider and Mary Walton, otherwise Waltham, otherwise Brider, ought to be strictly, and under pain of the law, admonished to separate from each other, and to abstain for the future from all pretended matrimonial, incestuous, and unlawful cohabitation with each other; and we do by these presents so admonish them to abstain therefrom. And we do also pronounce, decree, and declare, that the said William Brider ought, by law, to be canonically punished and corrected for his excess and temerity in the premises, and that he ought to be enjoined and compelled to perform public penance for the same. And we do enjoin and command him, the said William Brider, to perform such public penance in the parish church of Harting aforesaid, on Sunday, the nineteenth day of May next ensuing, during the time of Divine service, in the forenoon of the same day, and whilst the greater part of the congregation shall be then assembled to see and hear the

Sunday, the 19th of May, next ensuing, during the time of Divine service, in the forenoon of that day, and whilst the greater part of the congregation might be assembled to see and hear the same.

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same ; and that the said William Brider do certify us of the due and obedient performance of the said public penance on or before the fourth session of the present Easter Term, to wit, Thursday, the twenty-third day of the said month of May. And we do also pronounce, decree, and declare, that the said William Brider ought, by law, to be condemned in the lawful costs made and to be made in this cause on the part and behalf of the said John Blackmore and James Thorpe, the promoters, and compelled to the due payment thereof ; and we do condemn him in such costs accordingly.

PREROGATIVE COURT OF CANTERBURY.

1816.
Easter
Term,
May 15.

GRIFFITHS and TRINDER v. BENNETT and TAYLOR.

Executrixes
pronounced
contumaci-
ous for not
bringing in
an inventory.

HANNAH BENNETT and Elizabeth Taylor, the daughters and two of the residuary legatees of William Jones, instituted proceedings against their sisters, Mary Griffiths and Anne Trinder, the executrixes of their father's will, for an inventory.

The probate of the will had passed in August, 1815, and the inventory had been assigned since the first session of Hilary Term, 1816; and, not being brought in, an application was made to pronounce Hannah Bennett and Elizabeth Taylor contumacious.

Per Curiam.

Parties must not hang back in cases of this description. I pronounce the executrixes contumacious.

CONSISTORY COURT OF LONDON.

MEDDOWCROFT v. GREGORY, falsely called **MEDDOWCROFT**.

1816.
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July 12.

THIS suit was promoted by William Meddowcroft, of Liverpool, for the purpose of annulling the marriage of his son, William Meddowcroft, of Gray's Inn, with Mary Gregory, a widow, on account of an undue publication of banns.

The marriage of a minor annulled on account of an undue publication of banns.

William Meddowcroft the younger had been taken from his father at a very early age, and brought up by two uncles resident in London :—one was dead, the other was a solicitor in Gray's Inn. When his school education was completed, he was articulated to his uncle, and received into his office. While serving his clerkship, he boarded at the house of a Miss Lewis, in Devonshire Street, Queen Square, where he became acquainted with Mrs. Mary Gregory, a widow ; and an attachment commenced between them which produced the marriage in question, on the 28th of February, 1815. William Meddowcroft was at this time between nineteen and twenty years of age, and Mary Gregory about thirty. The marriage took place in the parish church of St. James, Clerkenwell, after a publication of banns. But the banns were published

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under the names of William *Widowcroft* and Mary Gregory, and on account of this misnomer the validity of the marriage was impugned. It appeared that the entry in the parish register was made in the right names of the parties ;—but, in a book kept by the parish clerk at his own house, in which he entered the names of the parties applying to have their banns published, the entry was in the names of William *Widowcroft* and Mary Gregory. In the regular banns book the name had obviously been altered from *Widowcroft* to *Meddowcroft* ;—this was clear from the different colour of the ink in which the alteration was made, and from an erasure which had been made by a knife. The parish clerk and Mrs. Alexander, who were present at the marriage, proved that when the parties were about to sign their names the mistake in the name was discovered in the banns book, and the clerk then altered it from *Widowcroft* to *Meddowcroft*.

James Meddowcroft, the uncle, deposed

“That in April or May, 1814, he received a letter from his nephew, stating that a mutual attachment had taken place between him and Mrs. Gregory, requesting his consent to the marriage, and asking for an increase of his allowance ; to which the deponent answered by letter,—that he was not at a proper age to talk on such a subject, and that if ever he married Mrs. Gregory, or mentioned the circumstance again, he would instantly turn him out of doors, and leave him to get his livelihood as he could ;—that he then went to Miss Lewis’s boarding-house to inquire into the fact ; and while he

was conversing with Miss Lewis,—Mrs. Gregory having, as he believes, listened at the door, came in and said, she believed she was the subject of his conversation, and confessed that William Meddowcroft had formed an attachment for her, and that a marriage between them had been proposed; but that it was not intended to be without the privity and consent of the deponent, whose consent they hoped in due time to obtain:—to which he replied that her own utter ruin and beggary would be the inevitable consequence of their marriage; for that he was determined to turn his nephew out of doors if ever it took place, and utterly to abandon him. That he went again at another time, accompanied by a friend, to Miss Lewis's, and that his friend then told Mrs. Gregory that she must be greatly in want of a husband to think of marrying such a boy as the deponent's nephew, who had not the means of purchasing a bed for them to lie on. Mary Gregory replied, that she did not understand from his nephew that the deponent was so peremptory and positive but that his consent might be obtained some time hence;—whereupon the deponent repeated to her his fixed and determined resolution:—as a proof of it he offered to send her a copy of the letter he had sent his nephew. Upon which Mary Gregory appeared to give up the marriage;—but expressed a wish to see a copy of the letter, which he accordingly sent her; and in reply he received a letter from her in which she stated, that seeing the marriage was so much against the deponent's approbation and consent, she should give up the matter, and think no more of it:—that he

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considered he should never hear any more of this marriage ;—that he removed his nephew from Miss Lewis's, and it was not till November, 1815, that he was told by a friend that the marriage had actually taken place."

Swabey and Lushington for Mr. Meddowcroft.

It is not necessary to shew that actual deceit was effected ;—it is sufficient if it were such a publication as would have the effect of deceiving those who heard it. We contend that a publication is void where there is such a variation in the name as to conceal the identity ;—but that it is not void where it is not such as to affect the question of identity :—therefore, it is not void where it is the mere omission of one among other Christian names, which is not commonly used. The difference here is material in this amount :—to take a similar instance,—Berrington and Merrington are names which would sound nearly similar ; yet, if one name was used for the other in a publication of banns, the parents would, if present, be completely deceived. In *Mather v. Ney*, where the publication was in the name of Wright, instead of Ney, there was no fraud, but the marriage was held void.

Jenner and Dodson for Mrs. Gregory.

It is of consequence that contracts actually made should not be annulled. The act does not expressly require that publication to be in the true names : but such has been the construction of it, and we must allow it to be sound. But the Court would not carry the restrictions further than the object of the act requires ;—fraud should be shewn :—here

fraud is pleaded in the libel, but none is pretended to be proved. The uncle had heard that the marriage was intended, and broken off;—could he have been deceived if he had heard the banns?—the father was at a distance, and could not hear them. The order for the publication was received by the daughter of the parish clerk. If there was error, can it without fraud vitiate a marriage of this kind. The cases where marriages have been held void are those where there has been fraud, or the assumption of a name to which the party has not been entitled. *The King v. The Inhabitants of Billinghamst, (a)* and *The King v. The Inhabitants of Burton-on-Trent, (b)* where fraud was allowed not to have been intended, were held good.

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Swabey and Lushington in reply.

Before the act a true publication was necessary;—it was no publication if not true. Concealment is fraud;—it does not appear to have been the mere mistake of the clerk's daughter. The main object of the act is notoriety;—if that be defeated, that brings it within the rule laid down by Lord Ellenborough, who held a marriage good, the name (a wrong one) being used by which the party was known. If the clergyman made the mistake, the *animus publicandi* in him cannot be held sufficient:—in the book it stood Widowcroft. The object of the parties throughout has been concealment.

JUDGMENT.

Sir WILLIAM SCOTT.

This is a proceeding by a father to dissolve the

(a) 3 Maule & Selwyn, 250.

(b) *Ib.* 537.

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marriage of his son, a minor, on the ground that it was without his consent, and without publication of banns. The act, though not in words, yet in fair construction, requires the publication to be in the true names.

The young man had two uncles in London, who acted with parental regard for him ;—they sent him first to a small school, thence to the Charter-House, and then put him under a solicitor. He went to lodge at a Mrs. Lewis's, where Mary Gregory came afterwards to lodge ;—an attachment took place between them, though certainly there was a considerable disparity in age ;—he was a minor, she above thirty. Whether there was any other disparity does not appear ; nor what provision was intended for the young man. The difference of age is material ;—it was an unseasonable marriage for a young man in the course of education ;—his judgment must be immature, and it could not be prudent to form a matrimonial connexion. On disclosing his intention to one of his uncles, he expressed his entire disapprobation of it both to him and the lady, and he withdrew him to another house. The connexion, however, was kept up, and they afterwards married. It was not till some months afterwards that the uncle heard of it,—who then expressed his anger at it. The fact of the marriage came out from the woman having communicated it to Mrs. Alexander, who was the only person invited to attend it, which she did.

*Elizabeth Bradley*, who keeps a perfumer's shop, says “ she was employed to carry notice of the banns to St. John's, Clerkenwell :—on consultation

with her friends, she thought it right they should be published where there was the least chance of his friends hearing them."

Concealment, therefore, was clearly intended :—they consulted as to the most obscure church ;—where there was least likelihood that his friends should hear ;—the object then was that which it was the policy of the act to prevent. She gives notice of the names in her own writing to the clerk, who was not at home ;—and it is open to the observation—in how loose a manner a matter of such importance is conducted in the parishes in this town :—they were received by the clerk's daughter, and entered in a book, whence they were transplanted into the regular banns book ;—in the first, the name of the man is written Widowcroft, in the second it is Meddowcroft. At the marriage it appears it was first altered to the right name. Thus it appears that the publication was in the name of Widowcroft. A question has been raised, how far a marriage might be affected where there is no fraud ; if the name should be so distorted as to make quite a different sound :—no case however, has been cited on this point. Bradley, who delivered the banns, knows nothing but that they were given by Mrs. Gregory on a slip of paper. She had nothing to do with it but to convey it there ;—I must take the clerk's daughter to have received them as they were given.

The question is, Whether any fraud was intended ? It is said not ; for that the banns were published in a parish where the man's friends would not probably attend :—but that they would do all,

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as might be expected, they could to conceal, yet not so as to invalidate, the marriage. That it was in a church distant from his friends has no weight with me against the suggestion of fraud.

The objection would have been more material if fraud had been intended. I am of opinion that the alteration is material, and that it varies the substance of the name ;—the alteration of the initial letters makes more difference than of almost any other letters in the body of the name. It is only of late years that exactness has been applied to the spelling of names of families ;—formerly they were spelt in many different ways : but I think this alteration so material that it would deceive those who heard it. The uncle, who had advice before, might not be deceived ; but the friends, who were not acquainted with the clandestine intention, might :—and it was intended to elude the vigilance of parental authority ;—it was intended to be clandestine, and this is an auxiliary circumstance ; it is to be considered as part of a plan. The man does not appear to have been conscious of it ;—at the marriage he discovered it, and desired it to be set right, and then the alteration was made.

On the whole, therefore, I am of opinion that it is a fraudulent publication, and effected for fraudulent purposes ;—that the name was altered to elude the knowledge of those interested in preventing the marriage ;—and I declare the marriage to be null and void.

ARCHES COURT OF CANTERBURY.

CLUTTON and WALLER v. CHERRY.

*By Letters of Request from the Official of the  
Archdeaconry of Lewes.*

1816.  
Michaelmas  
Term,  
Nov. 9.

**WILLIAM CLUTTON** and Samuel Waller, the churchwardens of Cuckfield, in Sussex, libelled John Peter Cherry, a parishioner, for refusing to pay a church-rate.

Not necessary in all cases that notice should be given of the specific purpose for which a parish vestry is convened.

The libel pleaded, in substance, "that in the year 1802 directions were given by the Bishop of Chichester to William Clutton and Samuel Picknell, then churchwardens of Cuckfield, to repair and re-pew the parish church—and, at a public vestry called on the 29th of November in that year, it was resolved that the churchwardens should apply for a faculty for that purpose. That on the 19th of February, 1803, a faculty was obtained from the Consistorial Court of Chichester, by which the churchwardens were authorized and

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empowered to repair the church, by erecting new pews instead of the old ones, which by length of time were become decayed and worn out.

“ That from this period William Clutton has been continually re-elected to the office of churchwarden, for the purpose of better enabling him, in conjunction with the other churchwarden, to take the necessary steps for repairing the church. That, with a view to the convenience of the parish, it was judged expedient not to proceed to re-pew the whole church at once, but to complete the same by degrees, doing a small portion of the work in each successive year; and accordingly different rates, from time to time, were duly made and assessed; and by such means the sum of £1435. 9s. 6d. has been collected, and the sum of £1589. 14s. 8½d. expended, down to Easter, 1814, being about 6½d. in the pound upon each occupier; and the church has thereby been repaired and re-pewed without any material inconvenience or burthen to the parishioners:—but that some repairs are still wanting, which may be completed in about two years.

“ That a public vestry was held on the 11th of April, 1812, after the usual and customary notice, and it was ordered that a rate should be made for the repairs of the church and the pews; and this order was confirmed at a subsequent vestry, duly held, according to notice legally given for that purpose, and the rate was confirmed by the surrogate of the official principal of the diocese.

“ That John Peter Cherry was a parishioner, and assessed at the sum of £8. 1s. which he has refused to pay.”



*In reply* to this libel an allegation was given in on the part of John Peter Cherry, pleading that "neither of the said meetings of vestry were held in pursuance of legal notice, for that the only notice which preceded either of them, if any were in fact given, was in the following words: to wit, 'The chiefs of the parish are desired to meet in the vestry after service;' and the first of these meetings of vestry was held on Saturday, the 11th of April, 1812; and no other notice was given of a subsequent meeting of vestry, if such meeting was in fact held, or any notice given when the order of the said former meeting is alleged to have been confirmed. That the several notices were undue and illegal for the purpose for which such meetings were convened, and the rate or assessment made null and void."

To this plea a *responsive* allegation was given on the part of the churchwardens, stating "That on Sunday the 5th of April, 1812, the following notice was given in the parish church of Cuckfield:—'*Notice is hereby given, that a vestry will be held on Saturday next the 11th of April instant, at the hour of eleven in the forenoon, for making a rate to enable the churchwardens to complete the pewing and necessary repairs of the church.*' And that the said notice was read and published by the clerk of the parish, in the parish church of Cuckfield, on the said day. That it has not been usual to make entries of vestries for holding vestries, in the vestry book of the parish. That the form of the notice aforesaid was written out by Samuel Waller, then churchwarden, and was sent or

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delivered by him to the clerk of the parish who published the same."

No witnesses were examined on the part of John Peter Cherry : but in answer to the fourth and fifth articles of the libel, he deposed that " He has heard, and believes that a public vestry may have been held on the 11th day of April, 1812, in the vestry room of the said parish of Cuckfield, but denies that the same was duly called or held; and he knows not, and is unable to form a belief or disbelief whether the usual and customary notice, or any notice of such meeting, was in fact given : and he knows not, but has heard and believes that it may have been resolved, agreed, and ordered at such meetings that a rate should be made for and towards the repairs of the church of the said parish, and the pews and seats therein : but he knows not, and is unable to form a belief, or disbelief, whether or not the said order was confirmed at a subsequent vestry, or that any such subsequent vestry was in fact held for that purpose ; but, if there were, he denies that the same was duly held, according to notice legally given for that purpose. And this respondent, further answering, saith that he knows not, but has heard and believes that a pretended rate or assignment for and towards the repairs of the church of the said parish, and the pews and seats therein, was, in fact, but illegally made according to a pound rate, being the usual way of making rates in the said parish, but he denies that the charges of such repairs were necessary, the same having, as he has been informed and believes, been in great part improvident, and not requisite."

The form of the rate commenced thus :—“ We, the churchwardens of the parish of Cuckfield, in the county of Sussex, and diocese of Chichester, whose names are hereunto subscribed, do this eleventh day of April, in the year of our Lord One thousand eight hundred and twelve, rate and tax all and every the inhabitants and parishioners of the said parish hereunder mentioned, for and towards the repairs of the church of the said parish, and the pews and seats therein, in the several sums following : &c.”

*Robert Sturt*, (who was parish clerk from July, 1811, till the end of 1812,) deposed,—“ That he could not state whether any vestry relating to the repairing of the church was held on the 11th of April, 1812, nor whether the proceedings of that vestry were confirmed by a subsequent vestry, nor whether any such vestries were held in pursuance of notice legally and customarily given : that the usual mode of giving notice of vestries to be held for any particular purpose was for the deponent to deliver it during divine service, in pursuance of directions previously given to him by the churchwardens ; so that if the business was only of ordinary occurrence and of trivial import, he was directed verbally ‘ *to request the chiefs of the parish to meet at the poor-house as soon as divine service should be over :* ’ which message or notice he accordingly delivered from his reading desk : but, at other times, as he thinks, when business of more than ordinary importance was to be transacted, a written notice was delivered to him by one of the churchwardens stating the time and place of the

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intended meeting, and mostly, but not always, the purpose or business of such meeting, which notice he read, and afterwards either destroyed the same, or returned it to the churchwardens. He thinks he most generally destroyed them : but no notice whatever was kept of them : and he cannot now recollect whether he gave any such notice for the vestry meeting of the 11th of April, 1812."

*In reply to an interrogatory* this witness swore " that Mr. Medwin, an attorney of Horsham, and his son, called upon him when he was in jail at Horsham, the winter before last, accompanied by John Peter Cherry, and made enquiries of him respecting the notice in question, and the usual mode of his giving such notices ; and he cannot recollect that he then declared to them that, except as to poor-rates, he never gave any notices of vestries in any other words than those of '*the chiefs of the parish are desired to meet in the vestry after service,*' or that he was positive that in any notice which he ever gave a church-rate was not mentioned ; he may have given notices respecting church-rates which he cannot recollect that he did ; —he did then declare that he had no recollection of having given any such notice, and he could not swear that he had given any such."

*Samuel Picknell*, vestry clerk for the last ten years, deposed,

" That at a vestry held on the 6th of April, 1814, the accounts of William Clutton and Samuel Waller the churchwardens, in relation to the rates were examined and approved of by the vicar and certain inhabitants then present, and that at a further

vestry on the 18th of April, 1814, the said accounts were further examined and approved of by other parishioners not present at the former meeting. That the deponent on the occasion of each of these vestries made an entry at the end of the accounts of such examination and approbation; which entries were severally signed by the persons present. He cannot say whether a vestry was called on the 11th of April, 1812, after any notice given; nor whether it was at such vestry resolved that a rate should be made for the repairs of the church, nor whether such order was confirmed at a subsequent meeting held according to notice legally given:—as it was not usual then to make entries in the vestry book of any vestries held for the purpose of making rates;—minutes were occasionally made of the proceedings of vestries for other purposes;—but not for making rates;—he is unable to say whether any notice was given, as no record was left of such notices. The churchwardens usually gave their own notices.”

*Jenner and Phillimore for the churchwardens.*

The vestry was duly called on the 11th of April, 1812, and the rate was ordered to be made;—this was confirmed by two subsequent vestries, which expressed their approbation of the conduct of the churchwardens.

*Swabey contra.*

A rate is to be made in vestry, called according to notice in the church that all may attend:—in this case there is no proof of notice; therefore, the rate cannot be considered as valid, for it is necessary in law if a vestry is held to make a church-

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rate, that there should be specified notice of the purpose for which it is called.

*Per Curiam.*

Can you support that position by authority?

*Swabey.*—In Degge's Parson's counsellor it is laid down that the rate is to be made upon notice.

*Per Curiam.*

If a vestry is called, is not every parishioner bound to attend; or if he does not, is he not bound by the acts of those who do?—it may be more convenient that the notice should be given in the manner you state;—but if it is strictly necessary that it should be so given, I fear most rates in country parishes would be invalid. Here you stand on this point of law; you do not say the party was unequally assessed, or otherwise. As to the fact, all that the witness states is, that at the end of three or four years he does not recollect the notice. If the vestry was held, is it not, at this distance of time, to be presumed that it was held by legal notice?

*Lushington on the same side with Swabey.*

The churchwardens have no right to take a rate till it is distinctly proved that the inhabitants have not refused to concur in it;—this is the law. This rate is illegal on the face of it: it is a rate made by the churchwardens, but not in vestry; signed only by the vicar and churchwardens, and the vicar has not been examined. A notice of the calling the vestry is absolutely necessary;—it is a proceeding for taxation to which every parishioner has a right to assent or to dissent. The summoning “the chiefs of the parish” is no notice; they

have not proved this was not the nature of the summons ;—and it lies on them to prove the notice, they might have called persons to negative the words in which it is asserted to have been given. None of the parish prove the libel of the churchwardens.—It is the duty of the Court to look narrowly into rates ;—it is high time that these irregular practices should be corrected.

*Jenner and Phillimore in reply.*

The circumstances proved are such as raise a strong presumption that a notice was regularly given ; it lies on the party impugning the legality of it to prove that the notice was not given ; if the notice summoned the “ chiefs of the parish,” there is nothing in such an expression which would make it illegal. Chiefs of the parish may mean those who were entitled to vote. Again if the rate was illegally imposed in the first instance, it was made good by the vestries of the 6th and 18th of April, 1814, in both of which meetings the accounts of the churchwardens and their acts in the conduct of this business were canvassed and approved of. It is laid down by Prideaux (a) that if the rate be illegally imposed without the parishioners’ consent, yet if the rate be afterwards assented to, and confirmed by the majority of the parishioners ; that will make it good.” No objection is made to the rate on the ground of its being exorbitant or unnecessary. The churchwardens have, it must be admitted, for many years been engaged in a most meritorious work. The objection taken is

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the more ungracious because it is taken by a parishioner who occupies one of the best pews in the church; but who attempts to avail himself of a legal subtilty to escape from contributing his share of payment to a work of which he himself has reaped the benefit.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit brought by the churchwardens of Cuckfield, to recover a church rate from John Peter Cherry, a parishioner.

It is pleaded that the church was out of repair; that the bishop inspected it, and directed it to be repaired;—that the parishioners undertook the repairs, and a faculty was obtained in 1803;—and as the expenses would be burthensome the repairs were done from year to year, to lessen the burthen:—one of the churchwardens was continued in office to carry them on.

On the 11th of April, 1812, a rate was duly made at a vestry regularly held, which was confirmed by the ordinary. Cherry was assessed at 8*l.* 1*s.* 0*d.*, which he refuses to pay. The defence set up by Cherry in plea is, not that the repairs were unnecessary; not that the money has been improperly expended; not that the rate has been unequally assessed; not that it was disapproved of by the parishioners; but that it was made at a vestry held without due notice, for that the *chiefs of the parish* were only desired to meet after service;—that the first vestry was on Saturday, the 11th of April, and that the subsequent vestry, at which the rate is stated to have been confirmed, was



held without any other notice ; and, consequently, that the rate is void. It alleges affirmatively that the notice was given, and that it was not a sufficient and legal notice. This allegation was given I presume for the purpose of being proved (for what other purpose is an allegation ever given ?) yet not a witness has been examined on it.—The counsel say they did not call for answers : this is strange : but if so, it must only have been because the allegations of the other side were sufficient answers. The answers, however, have not been read ; and therefore, the Court must presume that they do not prove the allegation.

In reply to an allegation of John Peter Cherry a further allegation exhibits a paper pleading it to be the draft of the original notice ;—this notice is not objectionable in point of form according to the highest notion of law. The parish clerk has been examined ; he states that it is not usual to make entries in the vestry book of notices ;—in many parishes within my own knowledge it is not so ; it would be more regular if it was : but the business in many parishes is carried on by persons ignorant of forms. In the vestry books there are entries expressive of approbation of the churchwardens' accounts which had been passed at two successive vestries ;—it appears that they were often considerably in advance for the repairs ; that they were so when this rate was made, and that it was made by the majority of the parishioners.

These are the grounds on which the defendant has refused to pay this rate : he does not set up that the repairs were unnecessary ; nor that the

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churchwardens acted fraudulently, or even extravagantly. He does not deny that the parish was fairly assessed, or that the assessment was not made at a public vestry ;—he does not deny that some notice was given, *qui ponit faletur* ; but he has resisted payment, and involved the parish in this suit on a mere point of form, that it was not such a notice as the law holds necessary, or that there is not strict legal proof of there having been a notice. Perhaps in this I am giving too much credit to the individual ; even this was probably an afterthought ; for about three years ago it appears that he and his attorney went to the parish-clerk, who was then in prison, and questioned him closely whether he could remember the particulars of this notice.

In the first place I am yet to learn, and I have called upon the counsel for authority on this point, and they have not brought it, and it goes to the very foundation of their case, *that notice must be given of the specific purpose for which a vestry is to be called* ;—it may be fit and proper if any thing peculiar is to be done, and the parish are to be involved in expenditure, that the specific purpose should be stated ;—it may be highly proper ;—but a distinction is to be taken between what is highly proper, and strictly legal. I take the true principle to be that the parish ought not to be involved in expenditure without its privity, and that the parish ought to have the opportunity of seeing that the burthen is fairly laid. But here the faculty had already been obtained ;—the expence had been incurred ;—it is not pretended that there was any

difference in this rate from the one which had been made before for the same purpose;—it was as much a matter of form and of course in the ordinary notice of business under the circumstances stated as could well be imagined.—For such a purpose, I am not prepared to say that even such a notice as was given, was necessary. I do not know that the form of the notice is objectionable in summoning "*the chiefs of the parish*" to meet. Who are the chiefs? they must be the persons who pay to the church-rate, in contradistinction to the inferior members of their families, or persons otherwise not rated. If so, I have no doubt that any person might have been present who was entitled to attend;—therefore, I am not prepared to say under the circumstances of this case (to which the Court must be understood to limit its observations) that there was not a sufficiency of notice respecting the purposes and object of this vestry.

But, if a formal notice be necessary, as has been contended, has the Court any reason to doubt that such a notice was given? The answers of the party make it unnecessary to prove this;—they admit that the vestry was held;—the party states "*he has heard and believes so,*" which is in fact an admission. The use of answers is to save the necessity of taking evidence;—I must conclude that the vestry was held, and that some notice was given; for he will not venture to say he disbelieves that any notice was given: he believes a vestry was held, and that at that vestry a rate was made. It is very true that if nothing

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was done at that vestry but what appears at the head of the rate, it would be necessary to prove other circumstances. But it is not unusual to resolve at a vestry that a rate shall be made by the churchwardens; not that the rate is then made. The instrument was not drawn up at the vestry; but only the resolution passed. I think it is in proof that this rate was made at the vestry of the 11th of April.

The point then is, whether there was sufficient notice? I think the fact of the vestry having been held, and proceeding to business furnishes a presumption that it was rightly called, and throws the burthen on the other party to shew that the notice was not given;—this is the stronger when the person has not acted upon this, nor taken any objection to it at the time, or given any notice that he wished the subject to be discussed;—he lies by for two or three years, and then calls upon the churchwardens to prove a sufficient notice by evidence. He avers a negative, and a negative capable of proof; but he examines, as I have already observed, no witnesses to prove it. At the end of three or four years can it be expected that the witnesses should recollect an exact notice?—all they swear is that they cannot speak positively. A copy of the notice is produced;—I am not to believe this is fabricated; and the vestry clerk says that it was his habit to send such notices, though he cannot recollect the precise notice. He apprehends he did send a written notice of that date, and that it was the practice of the churchwardens to direct him to send such notices.—There is no evidence what-

ever on the other side to shew there was no such notice.—Even if there had been any informality, I cannot help agreeing with the counsel for the churchwardens that the facts which afterwards took place must be held to have confirmed the rate ;—for the parishioners pay it ;—they receive a report upon this rate, and they vote their thanks to the churchwardens for their conduct.—I think this conduct would confirm the rate.

The Court has been cautioned against sanctioning the churchwardens in improper expenditure, and in raising money against the will of the parish. I agree with the observation : but never was observation more inapplicable ; never were persons who proceeded more properly and regularly than these churchwardens have done. The Court also is to be cautious not to suffer the whole business of the parish conducted, as it necessarily must be, by illiterate persons, and persons ignorant of business, to be set aside on the ground of high legal notions for which no authority has been produced, and by requiring strict proof of forms after the lapse of three years ;—this would be to throw every thing into confusion, and to encourage litigation.

I am of opinion that the libel is sufficiently proved, and I pronounce for the rate.—It has been usual to give costs in these cases, unless there is strong ground to justify the defendant. It is also the duty of the Court to protect the parish officers from expence unless they have acted improperly, and to repress individuals from

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disturbing the harmony of the parish and involving it in litigation.—I think I should stop short of my duty if I did not condemn the party in costs.

  
Costs given.

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CONSISTORY COURT OF LONDON.

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Nov. 29.*

LEITH v. CLIFF.

**I**N a suit brought by the Rev. Lockhart Leith, rector of South Ockenden, in the county of Essex, against John Cliff, a parishioner, and inhabitant of the said parish, for subtraction of tithes, the 27th article of the libel pleaded that, " John Cliff from the year 1807, and until the present time, hath possessed and enjoyed a certain mill for grinding corn situate upon his said lands and premises in the said parish of South Ockenden, containing five pair of stones, and the same works by water and also by wind; and that in each year commencing at and from the 29th day of September, 1807, and until the 29th of September, 1813, the said mill hath produced to the said John Cliff after *all expences and out-goings of every description were paid and satisfied* the clear sum of 4000*l.*, 3,500*l.* or at least 3,000*l.*; and the tithe thereof accordingly was and is due to the Rev. Lockhart Leith."

In answer to a libel in a suit for subtraction of tithes it is not sufficient to state deductions generally; they must be specifically set forth.

The answer of John Cliff to this article denied the statement in the same words in which it was given; and set forth generally that instead of a gain there was a loss from the mill.

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*Arnold and Jenner, in objection to the answers.*

The party must set forth the deductions he claims ;—it was so directed on a plea as to the net profit, when the answer generally denied it in *Lagden v. Robinson and Green*, (a) where it was stated that there was no profit ; but further answer being required as to deductions, they were afterwards set forth in plea, and tithes to the amount of 65*l.* was recovered.

*Per Curiam.*

I have no doubt on this point ;—the party must set forth the deductions claimed.

(a) *Lagden v. Robinson and Green*, Consist. London, July 10, 1807.

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## ARCHES COURT OF CANTERBURY.

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 BURNELL v. JENKINS.
 

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*An appeal from the Consistory Court of Llandaff.*


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*Dec. 2.*

**THIS** was an appeal brought by Edward Burnell, of the parish of Newton Nottage, in the county of Glamorgan, against the Rev. Richard Jenkins, rector of that parish, in a suit for subtraction of tithes which had been decided in the Consistory Court of Llandaff, on the 22d of December, 1814.

A rector held not to have been let, in the sense of the 2 and 3 Ed. 2. in the carrying away his tithes. Sentence of the Court of Llandaff reversed.

It appeared from the proceedings that the appellant had a hay-field of four acres, called Shortland, out of which there had been for many years a gate into the public road : but in 1813, he removed this gate, and filled up the gateway with a wall, and determined to carry his hay through an adjoining field with which there was a communication by a gap ;—in pursuance of this intention

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when the hay was cut and made into grass cocks, the usual state for tithing, he gave notice to the collector of the tithes for the rector who had attended to tithe the hay that it was to be carried through the adjoining field. The rector refused to carry it by the new way, but insisted that it should go through the old gate, and sent two men to pull down the wall which had been erected in the place of the gate;—this attempt was successfully resisted by the farmer, and the tithe-hay was left on the ground, where it rotted;—it was for the subtraction of this tithe that the suit was brought; and the Court of Llandaff decided in favour of the rector, and held that the tithe had been subtracted; and condemned the defendant in the costs of the suit.

It appeared in the course of this cause that the witnesses had not been examined upon the libel; but upon interrogatories or designations furnished to the examiner by the proctor:—and that, in point of fact, they had never seen the libel they were adduced to prove.

The amount of the tithe claimed was one pound.

*Swabey and Jenner for the rector*

Insisted upon his right to take his tithes by the usual and accustomed way;—and argued that the obstruction offered on the present occasion clearly amounted to a withholding of the tithes; and cited the 2 & 3 Ed. VI. c. 13. (a)

(a) And be it also enacted by the authority aforesaid, that at all times whatsoever, and as often as the said predial tithes shall be due, and at the tithing time of the same, it is to be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said

*Phillimore and Lushington for the appellant*

Denied that the rector was let or hindered in the sense of the statute of Edward VI. or could insist upon any customary or fixed way by which he was to take away his tithes ;—the way by which he was to take them was that by which the farmer carried away the other nine-tenths of the crop ; and this way the farmer might vary from time to time as might best suit his convenience, or the course of agriculture he might adopt with respect to his farm.

**JUDGMENT.**

**SIR JOHN NICHOLL.**

This is a proceeding instituted in the Consistory Court of Llandaff by the Rev. Richard Jenkins, rector of Newton Nottage, against Edward Burnell, a farmer and parishioner, for the subtraction of tithes. The Court of Llandaff has pronounced

tithes to be justly and truly set forth, and severed from the nine parts, and the same quietly to take and carry away : and if any person carry away his corn or hay, or his other predial tithes, before the tithe thereof be set forth ; or willingly withdraw his tithes of the same, or of such other things whereof predial tithes ought to be paid ; or do stop or let the parson, vicar, or proprietor, owner or other their deputies or farmers, to view, take, and carry away their tithes as is aforesaid ; by reason whereof the said tithe or tenth is lost, impaired, or hurt ; that then upon due proof thereof, made before the spiritual judge, or any other judge, to whom heretofore he might have made complaint ; the party so carrying away, withdrawing, letting, or stopping, shall pay the double value of the tenth, or tithe so taken, lost, withdrawn, or carried away, over and besides the costs, charges, and expenses of the suit in the same : the same to be recovered before the Ecclesiastical Judge, according to the king's ecclesiastical law.

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for the value of the tithes, *viz.* twenty shillings, and costs.

The case comes on here on the same evidence as in the Court below. There have certainly been irregularities in the proceedings of the inferior Court ;—but it was always laid down by my predecessors that this Court should endeavour, in the best way it could, to get at the substantial justice of the case, and not allow either party to be injured by the irregularities of the inferior jurisdiction.

The libel is in the usual general form ;—no allegation has been given by the defendant ; but he has put in his answers, and on them witnesses have been examined ; it is not uncommon in the country courts to consider answers as a responsive allegation, and to examine witnesses upon them. The judge had heard upon the admissibility of the answers, and each party seems to have fully understood the real point at issue between them.

The case does not turn on any question of right, or quantity, or value, or setting out of tithes ;—but the real question at issue is whether the rector was illegally prevented from carrying away the tithes, whether he was “let or stopped” in the sense of the statute of Edward VI. ; if so, double value is to be recovered. The case turning upon this point, it certainly would have been more regular to have pleaded the facts specially, either in the original libel, or in additional articles after the answers were put in ;—but this is not done : a strange proceeding takes place called a designation of the witnesses :—*i. e.* the proctors on each side set down

a full statement of what each witness can say, which is given to the examiner to examine by: this is a very irregular and dangerous practice. If a case depend on special facts, those facts should be specially pleaded;—the party may then object if they are irrelevant, and the witnesses may be cross-examined to them. It is only by this mode of proceeding that true justice can be got at, and evidence be obtained on which the Court can rely. Designations and evidence taken on them, as has been done here, are little more than *ex parte* affidavits.

In this particular case, however, there seems little doubt as to the facts upon the general result of the evidence:—the Court can only take the case as it finds it; and I shall now proceed to examine its merits.

The plaintiff is a clergyman, rector of Newton, and resides there;—the defendant is a farmer, who occupies two fields abutting on the road leading from Newton to Nottage, another village in the same parish, and at which he resides. One of these fields, that nearest to Newton, was, in the year 1813, a fallow;—the other, that nearest to Nottage, was mowed for hay. There had been gaps from each of these two fields into the road, and also from one field to the other. In the course of 1813 the farmer stopped up the gap from the hay-field into the road, walling up the principal part of it, about two thirds;—and filling the rest with thorns. In this situation the hay was made in the field nearest Nottage, and the tithe was set out on the 20th of July: there being thus no road

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to it but through the fallow-field ;—and the gate in the fallow-field was nearest to the residence of the rector, and furthest from that of the farmer. A plan has been exhibited by which this is rendered clear. By the plan and other evidence it also appears that another gateway out of the hay-field into the road, and nearer to Newton, had been stopped up by a former tenant, seventeen or eighteen years before ; and a new opening, or gate-way, was then made nearer to Nottage, and close by a house called Shortland Cot, ;—this latter opening was the gap already stated to have been partly walled up by Burnell ;—what were his motives in doing this has not been shewn, ;—it might be to save a gate, ;—it might be less expensive in fencing ;—the field being near the highway, it might be for more protection against trespass by cattle ;—it might therefore be done for his more commodious and convenient occupation : ;—there is nothing to shew that it was done maliciously and vexatiously ; ;—it must have occasioned similar, nay greater, inconvenience to himself in carrying away his crops, than it did to the rector.

On the 20th of July the tithes were set out. *Rees* states he was present when the farmer shewed the tithing man the way he was to carry his tithe by the gap to the fallow field, and so to the road ; ;—the tithing man raised no objection, but said it was sufficient, and the parties separated in perfect good humour. The farmer had no reason to expect any dispute about the way : ;—the matter was communicated to the rector, who considered he had a right, and insisted on the exercise of it ; and

determined to go through the gap by Shortland Cot, though the other was the nearest way. *Williams*, his own witness, states that he ordered him to take the tithe, and to enter the field at the old gap, two-thirds of which were walled up. He began, therefore, to pull down the stones;—the farmer came up and desired he would desist, and told him that he meant to carry his own hay by the other way;—the witness told this to the parson, who said he would go by the gap, and no other way;—he came to the spot, and the farmer shewed him the other way, and said he intended to take his own by that way. The witness thinks it would have been easier to go through the other gap than to pull down the stones. The rector said, “Damn you, you rascal, do you prevent me from taking my tithes?” To this the farmer replied, “No;” but shewed him the other way. The rector, however, persisted. On a question being put, Why he was so ill-natured with his parishioners, he said he never was easy but when quarrelling with them.

This is the account given by the rector’s own witness;—there is no reason to doubt his truth or accuracy;—his general credit is established by the rector’s having produced him;—he is confirmed by *Coleman*, and by the history of the general *res gesta*. It has been endeavoured to shew that there was no sufficient gap, by which it could be carried the other way: but this appears to have been an after-thought, and there is no proof of it;—the utmost that arises from the evidence on this point is, that the witnesses had not observed it. It is proved by others that it had been used before;—the farmer

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carried his own crop that way ; it was not the ground of objection taken by the rector at the time :—he does not say, I cannot go that way because it is an unfit road ;—the fallow is heavy, and my horses are weak ;—nothing of the sort is suggested,—he stands on his own indisputable right to go through the gap by Shortland Cot, and insists upon it that he has been “stopped and let.” This is an extreme right ; and to establish it, it must be made out that this was a stopping and letting within the meaning of the statute. It appears in evidence that there was another road by which he might have carried his tithe, and that a more convenient road, because equally good, and nearer ;—and he has expended several hundred pounds to establish this right,—to go by a more inconvenient way. In support of the position of law I expected some authority in point to be adduced in which it was laid down that if a farmer had once made an opening, and tithes had been carried through it, he may not afterwards for his own convenience and occupation shut up that opening, even though he make another through which the rector can as conveniently carry his tithes. Cases have been cited from the common law in which prohibitions have been refused, to shew that the Court may decide on the way by which the parson is to carry. This Court cannot decide on a strict question of the right of way :—the only question I can decide is, whether he was legally obstructed. It is laid down by Sir Simon Degge,^(b) that if the owner of the

(b) Part II. c. 14.

soil, after he has set out his tithe, shuts up the way, it is no good setting out :—but here there is no shutting up of the way ;—the farmer did not refuse to allow the rector to carry away the tithes, this gap was stopped up before ;—there was another opening equally convenient, through which the rector was invited, and through which the farmer carried his own crop. How can any court of justice hold that by this the statute was violated? But it must not be understood by this that the farmer may stop a way convenient to the parson, if he open another which is convenient to himself, but which may be very inconvenient to the parson, especially if it be done with a vexatious intention, such a proceeding may amount to an absolute obstruction, and to a fraudulent denial of tithe. I by no means lay down that the farmer may at his pleasure stop up a gap, and subject the clergyman to unreasonable inconvenience. This is not a case of that sort.

Again, if the rector could rest his case on an ancient right of way, (how far such a case could be tried here collaterally I do not say,) yet this opening was only made a few years before ;—it is shewn by several of the witnesses that there was an older way than this, which was stopped up by a former tenant.

The grounds on which the Chancellor of Llandaff decided this question are not set forth :—but he called for information respecting a verdict on a trial between the same parties at the great Sessions at Cardiff ;—one should have been led, therefore, to expect that that verdict would have been

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the ground of his sentence: but it is exactly the contrary. The issue appears to have been substantially the same in both cases. Burnell brought an action for damages against the rector, for not carrying away the tithes when they were set out. Jenkins pleaded not guilty, set up the obstruction of the legal road, and Burnell obtained a verdict. The ground must have been that there was no right of way, and that the rector was not obstructed. I am entirely of the same opinion; I think the rector was not let or hindered in carrying away his tithes, and that he had a fair and reasonable opportunity of carrying them away.

On these grounds I reverse the sentence. But certainly a further consideration remains, of importance to the justice of the case,—that of costs. In these courts it has always been held that costs are a matter of discretion,—not of capricious discretion, but according to the just consideration of all the circumstances. It is the duty of the Court on one hand to protect parties in the fair assertion of their just and legal rights; and on the other hand to check vexatious litigation. The Court of Appeal must endeavour to put parties in the situation in which they would have been if the court below had done right. It appears that the rector thought he had a legal right;—though the case in some of its parts exhibits a lamentable instance of the effect of ungovernable passion:—he did offer afterwards to refer the matter to the arbitration of two magistrates before the trial at Cardiff. This was refused, and perhaps properly, for I think it was hardly a fit case to refer to magistrates, because a

right was set up, and a question was made under the statute of Edward VI. But I cannot consider the defendant as not subject to some degree of reprehension. It is laid down that the rector may remove obstruction if it is thrown in his way :— this may not be the most adviseable species of remedy ; and the rector, if he resort to it, does it at his own risk of trespass, if he is wrong. Burnell did not warn the rector against the trespass, and reserve himself for his legal remedy, but prevented the pulling down of his fence by force :—if both had gone on, it might have led to further mischief, and ended in violence and riot, and possibly in bloodshed ;—but the rector, finding him resolved, sent his cart away. Burnell is also not averse to legal proceedings, for he brought a suit for the small damages which accrued, and put the rector to the expense of sixty pounds' costs, when the whole question might have been determined by the suit then going on in the Ecclesiastical Court. Another circumstance weighs still more with me ; —he not only refused to let the matter be settled, but when an arbitration was offered, he said he could not settle it without consulting the other parishioners. I do not mean to say that there may not be questions with the rector which the parishioners may agree to have tried by one of them, but I cannot make out that this is a case of that sort ;—this is not a general, but a particular question. I think, therefore, there is some appearance of a combination among the parishioners.

What the Court of Llandaff ought to have done would have been to have dismissed the defendant,

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but without costs, or with something merely *nomine expensarum*. But, on the other hand, the sentence having pronounced for the tithes, and condemned the defendant in costs, he was driven to the necessity either of appealing to this Court, or submitting to injustice. I think him on that ground entitled to his costs in this Court.

I therefore reverse the sentence, and dismiss the cause without costs in the court below ;—but I condemn the respondent in the costs of the appeal.

PECULIARS' COURT OF CANTERBURY.

DUNN v. DUNN.

1817.
Easter
Term,
May 17.

JOHN WILLIAM DUNN instituted a suit against **Eliza Papps Dunn**, his wife, for a divorce *à mensâ et toro*, by reason of adultery. It appeared that Mrs. Dunn eloped from her husband in October, 1815, with Mr. Knightley Musgrave Clay;— that she was brought back by her mother, and reconciled to her husband on the 1st of November following; and that on the 4th of December in the same year she again eloped with Mr. Clay. There was sufficient proof of the adultery: but the point made in the case was, that Mr. Dunn, by his negligence and connivance, had barred himself from any title to the remedy he claimed. Mr. Clay, who had been an officer in the same regiment (the 9th Dragoons) with Mr. Dunn, had been in habits of intimacy with him before his marriage, and after that event visited frequently at his house.

Adultery proved in a suit for separation *à mensâ et toro*, but the conduct of the husband such, as to bar him from a sentence in his favour.

The fifth and sixth articles of the libel pleaded,
“ That on or about the 16th day of October, in the said year, 1815, the said John William Dunn went to London, accompanied by his wife, the said Eliza Papps Dunn, to the house of his father, Mr.

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John Dunn; and soon after their arrival there the said Eliza Papps Dunn, in the absence of her said husband, quitted the said house in a hackney coach, and did not return thereto. That the said John William Dunn being greatly surprised and alarmed at the sudden disappearance of his said wife, made the most diligent search and enquiry for her, and at length found she had left London, but was unable to discover to what place she had gone. That in the beginning of the month of November following Dorothy Ann Papps, the mother of the said Eliza Papps Dunn, having received intelligence that the said Eliza Papps Dunn was residing at St. Omer's, in France, under an assumed name, proceeded thither, where she found the said Eliza Papps Dunn, and the said Knightley Musgrave Clay, living and cohabiting together as man and wife, and passing by the names of Mr. and Mrs. Brown. That they the said Knightley Musgrave Clay and Eliza Papps Dunn, during the time they so lived together as aforesaid, frequently slept in one and the same bed, whereby she the said Eliza Papps Dunn committed the crime of adultery. That the elopement of the said Eliza Papps Dunn, as before pleaded, was represented to the said John William Dunn, and especially by the said Dorothy Ann Papps, not to have arisen from any criminal connexion, but to have been occasioned by other circumstances. That the said John William Dunn, being deceived by such false representations, did, upon the entreaty of the said Dorothy Ann Papps, consent to meet her and the said Eliza Papps Dunn on their landing at Dover

from France, and accordingly met them there, on or about the 1st day of November, 1815. That upon such meeting taking place the said John William Dunn, being entirely ignorant of the adulterous intercourse which had taken place as before pleaded, was induced, at the earnest entreaties of the said Dorothy Ann Papps and his said wife, (who made the strongest protestations of innocence as to any adulterous intercourse, and expressed great contrition for her misconduct in quitting her said husband,) to receive her back again; and they then returned to his aforesaid house, at Ham Common."

Dorothy Ann Papps, the mother of Mrs. Dunn, deposed, "That she was at the house of John William Dunn, Esq. at Ham Common, on the 16th of October, 1815;—that on the morning of that day John William Dunn and Eliza Papps Dunn left their house to visit Mr. John Dunn, his father, in Bedford-street, Covent Garden. About seven or eight o'clock the same evening J. W. Dunn returned, accompanied by his father, and informed the deponent that his wife had quitted his father's house to inquire the character of a servant, but had not returned by the time appointed for their leaving town; and that he had been to every house where she visited in London, but could not find her. He was greatly agitated, and intimated to the deponent his apprehensions that she was gone off with Knightley Musgrave Clay. The deponent having never before heard any suspicion of an improper attachment between her daughter Dunn and Knightley Musgrave Clay, could not believe that there was

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any foundation for these apprehensions, but thought that Eliza Papps Dunn must have been detained at some friend's house beyond the time for returning home; and she therefore left Ham that evening and came to London in search of her, accompanied by Mr. Dunn. She called at the house of every friend where she thought it likely that her daughter might be found; but could not, nor could her husband gain any intelligence of her, until about a week or ten days afterwards, when a letter was received from her, addressed to Diana Andrews, the nursery-maid, who had charge of the children at Ham Common. The purport of it was to make inquiries about the children, and to desire Diana Andrews to write to her thereon, and it stated that the said Diana Andrews might ascertain how to direct her letter to her by inquiring at Mr. Mereweather's in Marlborough-street. She accordingly went to Mr. Mereweather's; and having understood that he was the friend of the said Mr. Clay, but a stranger to her daughter, the deponent asked him for Mr. Clay's address instead of for that of Mrs. Dunn. Mr. Mereweather informed her, that the only address he had by which to write to Mr. Clay, was that of '*Mr. Brown, St. Omer's, France,*' which he gave her on a piece of paper, but he did not say that Mr. Clay was passing under the name of Mr. Brown. The deponent communicated this address to Mr. Dunn, who, thinking it likely that some intelligence of his wife might be gained from Mr. Brown, requested the deponent to go to St. Omer's to him, which she consented to do, and immediately left town for that purpose. Mr.

Dunn accompanied her to Dover, where he remained, and she proceeded alone to St. Omer's. She arrived there about five o'clock in the evening, and stopped at an hotel, the name of which she has forgotten. She inquired at the hotel for Mr. Brown, and a servant shewed her to his lodgings. On inquiring for him there, the servant said he was at dinner;—but the deponent replied that she was a friend of his, and she followed the servant into the dinner-room, and found Mr. Clay and Eliza Papps Dunn at dinner together. The deponent reproached them with their conduct, called the said Knightley Musgrave Clay a villain, and asked her daughter how she could think of leaving her husband and children. In reply to which Mr. Clay assured her that he meant to act honourably towards Mrs. Dunn, by getting a divorce, and then marrying her;—and Mrs. Dunn said nothing, but burst into tears. The deponent insisted upon her daughter returning to England with her, which she agreed to do;—and accordingly left the room with the deponent to pack up her things for that purpose. Mr. Clay expressed his intencion to leave his said lodgings likewise; and accordingly proceeded into the adjoining room, as he said, to pack up his effects. When they had finished packing up, they both accompanied the deponent to the hotel where she had first stopped; where, the gates of the town having been by that time shut, they remained that night. The deponent and her daughter slept together, and on the following morning went together in a post-chaise to Calais, to which place they were accompanied by Mr. Clay,

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who went alone in another post-chaise; but, on their arrival at Calais, they left him, and the deponent and her daughter went alone together to Dover. The deponent was so well pleased at getting her daughter to return with her to England that she did not ask her any questions as to the circumstances under which she was living at St. Omer's. When she left Dover for St. Omer's, Mr. Dunn said he would remain there until her return; but she did not then represent to him that the elopement of her daughter had not arisen from any criminal connexion, but had been occasioned by other circumstances as articulate, as she was at that time ignorant of the circumstances under which such elopement had taken place; nor was it in consequence of any such representations of the deponent that the said J. W. Dunn remained at Dover; but he did so of his own accord, and he requested the deponent to go to France alone; and, if she succeeded in finding Mrs. Dunn, to return with her to him at Dover. The deponent and her daughter arrived at Dover on the 1st of November, 1815. As the boat in which they were approached the shore from the packet, she observed Mr. Dunn walking on the beach. The said Mrs. Dunn left the boat first, and immediately went up to her husband, and they walked away together. The deponent, with Major Grant, a friend of Mr. Dunn's, who happened to come to England in the same vessel, followed them to an inn at Dover, which she thinks is called The Ship, and arrived there about a quarter of an hour after they had entered the same together. On entering the inn

they met Mr. Dunn alone in the passage ; and after some general conversation Major Grant withdrew, and Mr. Dunn then said, '*I am perfectly satisfied with what Elisa has told me, and shall ask you no questions ; it has made me very happy ;*' or he expressed himself in words to that very effect, as near as the deponent, in the agitated state of mind in which she then was, can now recollect. The deponent is unable to depose, whether or not, upon this occasion, the said J. W. Dunn, was ignorant of any adulterous intercourse between his said wife and the aforesaid Knightley Musgrave Clay, or whether she made any protestations of her innocence thereof, and expressed great contrition for her misconduct in leaving her said husband ; or whether it was in consequence of such protestations and contrition that he was induced to receive her back again as articulate ; for, after expressing himself satisfied with his wife's explanation, the deponent thought it as unnecessary as unpleasant to touch upon such a subject ;—but she says that she did not entreat him so to receive her back again ; for, however grateful she might feel towards him for such an act, and however desirous that it should take place, she should not have thought herself warranted in attempting to accomplish it by any entreaties of her's ; nor should she have wished it to take place, unless at his own spontaneous desire. The deponent, and Mr. Dunn and his wife, left Dover as soon after their arrival there as the horses could be got ready, and returned to the house of the latter at Ham Common."

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Isabella Mary Dunn, (the sister of the husband,) swore, "That after the departure of Mr. Dunn and Mrs. Papps for France, she remained at his house at Ham Common for four or five days or a week; and about that time she received a letter from her brother to apprise her that he and his wife would be at home on the following day. The deponent had been previously desired by her father, in the event of Mrs. Dunn's returning home, to leave the house; and on receipt of the said letter she accordingly did so, and returned home to her father. She is, therefore, unable to depose what were the representations made to her brother on the subject of his wife's elopement by Mrs. Papps, or what were the protestations of innocence made to him by his wife, or what was the conduct adopted by him in consequence thereof, except that in the letter received by her, (the deponent,) he mentioned that *his wife was innocent*; and he afterwards assured the deponent that she was so; but in what terms she cannot now recollect, as the deponent said very little to him on the subject, and wished, from its unpleasantness, to drive it from her mind as well as from his as much as possible. She has since burnt the letter received from her brother: but she thinks she can recollect the contents, as they were very short. They were, '*Dear Isabella, I have found her, and she is innocent: we shall be home to-morrow. Your's, affectionately, J. W. Dunn;*' or to that effect."

Lushington and Meyrick for Mr. Dunn.

Swabey and Jenner contra.

JUDGMENT.

Sir JOHN NICHOLL.

The marriage took place on May 15, 1818: the parties cohabited at different places, and had two children. The husband was an officer in the army: he had an intimate friend Mr. Clay, an officer in the same regiment, who resided with his mother at Ham Common. The adultery is charged with him; and it is fully proved. Mrs. Dunn twice eloped with him.

But the material point is whether the husband is entitled to relief under the circumstances stated in the evidence. Adultery forgiven is no ground of separation—condonation bars sentence; but not necessarily where there is subsequent adultery, though it will induce the Court to look with particular jealousy into the case; for if the adultery is forgiven with such extreme facility as to shew no sense of injury, and no care is taken to prevent it from happening again, then the husband has no ground of complaint, for he has encouraged the adultery by his conduct; *volenti non fit injuria*; and Courts allowing such facility, instead of being the guardians of morality encourage corruption. On 16th Oct. 1815, the husband and wife went to town; she goes out on some pretence, and does not return;—he goes back to Ham Common. It does not appear that he had then known of the adultery; but he intimated his apprehensions that his wife had gone off with Clay. Something, therefore, must have happened which he had observed to lead his mind to this suspicion. A week or ten days afterwards the nurse receives a letter from

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her, telling her how she might learn where to address her by inquiring at a place named in London. The mother goes ;—finds the person mentioned, whose name was Mereweather. She asks for the address, not of Mrs. Dunn, but of Clay ; it is given to *Mr. Brown, at St. Omer's*. She communicates this to the husband. He desires her to go to St. Omer's ;—she goes ;—he goes to Dover, and waits there ;—the mother finds her daughter living with Clay ;—they then come to Calais ;—Clay remains there ;—the mother and daughter return ;—the husband receives her at Dover ;—he could not but know that she had been living in adultery with Clay. The mother says when she left the husband at Dover he said he would remain there, of his own accord, not at any suggestion of hers ; he desired her to go, and if she found his wife to bring her to Dover. As the boat approached the shore, they saw him walking on the beach. The wife left the boat, went to the husband, and they walked away together : the mother and Major Grant followed them to the Ship Inn ;—they came a quarter of an hour after them ;—they met the husband in the passage ;—he addressed her, and said I am perfectly satisfied with what Eliza has told me ;—I shall ask you no questions ;—it has made me very happy. The mother does not know whether he was ignorant of the adultery, or that the wife made protestations of her innocence : for, after his professing himself satisfied, she thought it unnecessary to touch on the subject. The mother did not intreat him to receive his wife. She should not have thought herself justified in using her en-

deavours for that purpose, if it had not been his own spontaneous desire. Major Grant saw the mother and daughter with Clay at Calais ; came with the mother and daughter. The husband was walking in agitation on the shore ; his wife went to him, and they walked off together.

Here the husband is not receiving entreaties, contrition, or explanation ; but his conduct is that of a husband affectionately receiving a virtuous wife ;—such would shew agitation when she approached ; there is no mark of a husband sensible of injury. He asks no question of the mother, says not only that he is satisfied, but that he is made happy : there must have been some new arrangement mentioned to him which caused this. It has been pleaded that the mother having received intelligence, went to St. Omer's, and found her daughter and Clay cohabiting as Mr. and Mrs. Brown, as if it was a discovery of the mother's, whereas it appears that he was told the way to find her was, to address Clay as Mr. Brown, at St. Omer's ;—*that he was deceived by false representations, and on the entreaty of the mother received her.* This is all false. *That he was entirely ignorant of the adultery,* though he knew she had eloped with Clay, had suspected her before ; and she was found living with him. *That she protested her innocence, and entreated him to receive her.* If this had been proved, condonation under such circumstances would not bar subsequent adultery ;—but none of these allegations are proved.

The very circumstance of setting up a false case before the Court warrants every suspicion ;—there

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is no trace of any contrition ;—of any injunction of the husband's in the way of caution against renewing the correspondence with Clay. He suggests and writes to his sister that she is innocent ; it is impossible he could have believed her innocent ; his sister did not ; his father did not, for he required the sister to quit the house when she returned. Three days afterwards she told the servants she had been living at St. Omer's with Clay ;—she did not pretend innocence ;—she tells this, as it should appear, without any inducement. Clay returned to London ;—it does not appear what caution was used, except that her mother was living there ;—there must have been a communication and a plan laid ;—within five weeks Clay comes with a chaise to the neighbourhood, and they go off again ;—there is something clandestine ; but it must be to deceive the mother ;—nothing appears that the husband did ; he might be furthering the plan and giving it all facility. They go off, intending to go to Scotland by water, then by land ;—they go to Lincoln, she scarcely conceals herself ;—she goes to Birmingham where her husband had gone on military service ;—comes to London ;—writes letters. It does not appear that she had any interview with her husband, rather the contrary. She states that his father would throw her off if he took her again, not shewing any great apprehension of her husband.

There was a suit at common law, but no defence ;—no suit here for nearly six months ;—yet no appearance of any difficulty in finding her ;—no defence to the suit except by the counsel stating

as honourable men the difficulties which arise ;—
the suit may be collusion.

The mother says her daughter told her at St. Omer's she should get a divorce, and Clay would marry her ;—it is not proved that this plan was communicated to the husband, and was *what made him happy* ; but it renders the Court more jealous ; whether this led to the intended journey to Scotland to get a divorce more easily ;—to the suit without defence. All this makes the Court jealous lest it should be made a party to a plan of the parties to get a divorce to marry the adulterer. But I do not decide on this ground but on the total failure of proof of the fifth and sixth articles, pleading the husband's ignorance of the adultery, the contrition of the wife, and the inducements used to persuade him to receive her.

On the whole I am so little satisfied ;—and the husband comes before the Court so little entitled to cast off his wife, that I shall leave him to the superior Court for his remedy,—pronounce that he has failed in proof,—and dismiss his wife from this suit.

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PREROGATIVE COURT OF CANTERBURY.

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METHUEN v. METHUEN.

A codicil virtually revoked by another codicil of a subsequent date, there being no express words of revocation in the latter instrument.

PAUL COBB METHUEN, of Corsham Hall, in the county of Wilts, died on the 15th of September, 1816, leaving four sons and four daughters. Of the daughters two were single, and one was married to the Honourable General De Gray, and another to Lord Edward O'Bryen. The following testamentary papers were found:—

A will dated 12th of October, 1809.

A codicil dated 14th of April, 1812.

A codicil dated 10th of May, 1813.

A codicil dated 1st of April, 1815.

The only question in the case was as to the validity of the codicil of 10th of May, 1813. This codicil was propounded by the widow of the deceased who was the universal legatee for life named in it, and opposed by Mr. Paul Methuen the eldest son of the deceased; and the

residuary legatee named in the will, who prayed probate of the will and the other codicils:—the ground of opposition to the codicil in question was, that it had been virtually cancelled by a codicil of a subsequest date, viz. that of the 1st of April, 1815.

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The two codicils were as follows:—

“ A codicil to be annexed to the last will
“ and testament of me, Paul Cobb Methuen,
“ of Corsham House, in the county of Wilts,
“ Esquire, which will bears date the twelfth
“ day of October, one thousand eight hundred
“ and nine.

“ Whereas, I the said Paul Cobb Methuen,
“ have, in and by my said will, with respect
“ to the sum of fifteen thousand pounds, the
“ money by my marriage settlement stipulated
“ to be set apart as the portions of my younger
“ children, directed that the same should be
“ equally divided between such of my daugh-
“ ters as shall be living at my decease (ex-
“ cept my eldest daughter now the wife of
“ Lieutenant General De Grey) and I have
“ also by my said will directed Frederic
“ Lord Boston, and Sir Thomas Gooch, Ba-
“ ronet, trustees, in my said will named, to
“ raise out of my personal estate and effects,
“ after payment of my funeral expences, debts,
“ and legacies, the sum of six thousand pounds,
“ In trust to pay the same to all and every
“ my daughter and daughters lawfully begot-
“ ten or to be begotten (except my said
“ eldest daughter Matilda De Grey) who shall

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" be living at the time of my decease or born
 " afterwards in equal shares if more than one ;
 " and if but one to such only daughter at the
 " days and times therein mentioned. And I
 " did also in and by my said will further di-
 " rect that the interest and dividends of the
 " said sum of six thousand pounds should be
 " by the trustees in my said will named ap-
 " plied for and towards the maintenance, edu-
 " cation, and benefit of my said daughters
 " until their respective portions became pay-
 " able. Now in addition to and for a further
 " provision for my daughters Gertrude Grace,
 " Catherine Matilda, and Cecilia Penelope
 " Methuen, and also for my said daughter
 " Matilda De Grey, and likewise as and for
 " a further provision for my dear wife Matilda
 " Methuen, I do hereby further direct the
 " said Frederic Lord Boston and Sir Tho-
 " mas Gooch to raise out of my said personal
 " estate and effects, after payment of my fu-
 " neral expences, debts, legacies, the further
 " sum of twelve thousand pounds of lawful
 " money current in Great Britain, within eight
 " months next after my decease, and to pay
 " and apply the said sum of twelve thousand
 " pounds unto my said wife, whose receipt
 " shall be a discharge for the same ; which
 " said sum of twelve thousand pounds so to
 " be further raised as aforesaid I do hereby
 " give and bequeath unto my said wife, upon
 " trust that my said dear wife do and shall
 " place out the same at interest on government

" or such other security or securities as she
 " shall approve, and take and receive the in-
 " terest and dividends thereof from time to time
 " as the same shall become due and payable, to
 " and for her own proper use and benefit.
 " And upon this further trust and confidence
 " that, immediately upon and after the decease
 " of my said wife, the said principal sum of
 " twelve thousand pounds, and all interest and
 " dividends due thereon, shall be paid and
 " applied unto and amongst all and every my
 " said four daughters Gertrude Grace, Cathe-
 " rine Matilda, Cecilia Penelope Methuen,
 " and Matilda De Grey, in such shares and
 " proportions, and at such time and times,
 " as she, my said wife, shall by any deed or
 " deeds, writing or writings, to be by her
 " duly executed and credibly attested, or by
 " her last will and testament in writing, or
 " any codicil or codicils thereto to be executed
 " and attested as aforesaid, shall give, direct,
 " and appoint the same. Provided neverthe-
 " less that the portion or portions so to be
 " given, directed, and appointed by my said
 " wife as aforesaid, shall be the sole property of
 " my said several daughters, and independent
 " of any of their husband or husbands, and
 " her or their receipt or receipts alone shall
 " be a sufficient discharge or discharges for
 " the same ; and also upon this further condi-
 " tion, that on the decease or deceases of
 " all or any of my said daughters without
 " leaving legal issue, then and immediately

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“ after such her or their decease or deceases
 “ the share or shares of her or them as afore-
 “ said shall be paid and applied unto my eld-
 “ est son Paul Methuen, his executors, ad-
 “ ministrators and assigns ; and in case all or
 “ any of my said four daughters shall happen
 “ to die before my said wife, then and in such
 “ case upon trust that the share of her or
 “ them so dying in the life-time of my said
 “ wife as aforesaid, shall devolve to and be
 “ paid and applied unto my said eldest son
 “ Paul Methuen, his executors, administra-
 “ tors and assigns. In witness whereof I have
 “ to this my codicil contained in two sheets of
 “ paper, set my hand and seal, (that is to say,
 “ my seal to the ribbon which affixes the same
 “ together, and my hand at the bottom of the
 “ first sheet thereof, and my hand and seal to
 “ this second and last sheet thereof,) this 10th
 “ day of May, in the year of our Lord One
 “ thousand eight hundred and thirteen.

“ PAUL COBB METHUEN, L. S.

“ Signed, sealed, published and declared,
 “ by the said Paul Cobb Methuen, as and
 “ for a codicil to his last will and testa-
 “ ment, in the presence of us, who have
 “ hereunto subscribed our names as wit-
 “ nesses thereto in his presence, and in
 “ the presence of each other,

“ JOHN MEREWETHER, Attorney, Calne.

“ ANTHONY COOPER, butler to testator.

“ WILLIAM EADIE, footman to Mr. Paul Methuen.”

“ A codicil to be annexed to the last will
 “ and testament of me Paul Cobb Methuen,
 “ of Corsham House, in the county of Wilts,
 “ Esquire, which will bears date the twelfth
 “ day of October, One thousand eight hun-
 “ dred and nine.

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“ Whereas I, the said Paul Cobb Methuen,  
 “ in and by my said will, with respect to the  
 “ sum of fifteen thousand pounds, the money  
 “ by my marriage settlement stipulated to be  
 “ raised for the portions of my younger child-  
 “ ren, and disposed of by me as I should by  
 “ deed or will direct or appoint, have directed  
 “ and appointed that the same should be  
 “ equally divided between such of my daugh-  
 “ ters (my son being otherwise provided for)  
 “ as should be living at the time of my de-  
 “ cease, (except my eldest daughter Matilda,  
 “ now the wife of Lieut. Gen. De Grey.)  
 “ And whereas I have by my said will also  
 “ directed the Rt. Hon. Frederic Lord Bos-  
 “ ton and Sir Thomas Gooch, Bart. trustees  
 “ in my said will named, to raise out of my  
 “ personal estate and effects, after payment  
 “ of my funeral expenses, debts, and legacies,  
 “ the sum of six thousand pounds, in trust to  
 “ pay the same to all and every my daughter  
 “ and daughters, lawfully begotten, or to be  
 “ begotten, (except the said Matilda De Grey,)  
 “ who should be living at the time of my de-  
 “ cease, or born afterwards, in equal shares, (if  
 “ more than one, and if but one to such only  
 “ daughter,) at the days and times therein

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" mentioned; and I did also in and by my said  
 " will further direct that the interest and divi-  
 " dends of the said sum of six thousand pounds  
 " should be by my trustees in my said will  
 " named applied for and towards the mainte-  
 " nance, education, and benefit, of my said  
 " daughters, until their respective portions  
 " should become payable. And whereas since  
 " making my said will, and by a certain inden-  
 " ture of demise bearing date the 81st day of  
 " March last, made or mentioned to be made  
 " between me the said Paul Cobb Methuen,  
 " of the first part; and one of my said daugh-  
 " ters, namely, Gertrude Grace Methuen, of  
 " the second part; the Rt. Hon. Edward  
 " O'Bryen, commonly called Lord Edward  
 " O'Bryen, of the third part; and Lord James  
 " O'Bryen, Giffin Wilson, Esq. the Rev.  
 " Thomas Anthony Methuen, and John An-  
 " drew Methuen, Esq., therein more particu-  
 " larly described, of the fourth part; in con-  
 " templation of a marriage intended to be  
 " shortly had and solemnized between the said  
 " Lord Edward O'Bryen and my said daugh-  
 " ter the said Gertrude Grace Methuen se-  
 " cured and assured as and for a marriage-  
 " portion for my said daughter Gertrude  
 " Grace Methuen, the sum of ten thousand  
 " pounds of lawful money of Great Britain,  
 " to be paid Lord James O'Bryen, Giffin  
 " Wilson, Thomas Anthony Methuen, and  
 " John Andrew Methuen, their executors, ad-  
 " ministrators, and assigns, upon and under,



" and subject to the several trusts, provisos, con-  
 " ditions, and agreements, as are mentioned,  
 " expressed, and declared in and by a certain  
 " indenture of settlement bearing even date  
 " with the said recited indenture of demise,  
 " and made or mentioned to be made between  
 " the said Lord Edward O'Bryen of the first  
 " part; I, the said Paul Cobb Methuen and  
 " my said daughter Gertrude Grace Methuen,  
 " of the second part; and the said Lord  
 " James O'Bryen, Giffin Wilson, Thomas  
 " Anthony Methuen, and John Andrew Me-  
 " thuen of the third part. Now I, the said  
 " Paul Cobb Methuen, in consideration of  
 " such provision so made to and for my said  
 " daughter Gertrude Grace Methuen, do here-  
 " by revoke, annul, and make void the said  
 " direction and appointment so by me before  
 " made in and by my said will or otherwise  
 " with respect to the said several sums of  
 " fifteen thousand pounds and six thousand  
 " pounds, so far only as respects my said  
 " daughter Gertrude Grace Methuen, and her  
 " said share or proportion of the same respec-  
 " tively, but not further or otherwise with  
 " respect to my said other daughters, (except  
 " the said Matilda De Grey) and also except  
 " as to one thousand pounds, part of the said  
 " sum of six thousand pounds. And I the said  
 " Paul Cobb Methuen, do by this my said  
 " codicil request and direct the said Frederic  
 " Lord Boston, and Sir Thomas Gooch, Bart.  
 " to raise the sum of five thousand pounds

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“ only, instead of six thousand pounds, in the  
“ manner directed by my said will as afore-  
“ said, and to pay and apply the same in the  
“ manner also directed by my said will, (ex-  
“ cept as to the said Matilda De Grey and  
“ Gertrude Grace Methuen.) And I the said  
“ Paul Cobb Methuen do also by this my said  
“ codicil, as a further provision for my said  
“ daughter Matilda De Grey, hereby further  
“ direct the said Frederic Lord Boston, and  
“ Sir Thomas Gooch, Bart. to raise out of my  
“ said personal estate and effects after pay-  
“ ment of my funeral expenses, debts, and le-  
“ gacies, the further sum of three thousand  
“ pounds of lawful money of Great Britain,  
“ within eight months next after my decease,  
“ and pay and apply the same unto my said  
“ daughter Matilda De Grey, to and for her  
“ own proper use and benefit. And I, the  
“ said Paul Cobb Methuen, do by this my said  
“ codicil, as a further provision for my said  
“ dear wife Matilda Methuen, give and be-  
“ queath to her one annuity or yearly sum of  
“ six hundred pounds of lawful money of  
“ Great Britain, to be paid to her and her  
“ assigns by two equal half-yearly payments  
“ in the year, for and during the term of her  
“ natural life, to and for her and their own  
“ proper use and benefit, the first payment  
“ thereof to begin and be made immediately  
“ upon and at the expiration of six months  
“ next after my decease; and I do hereby  
“ charge and make liable all and singular my

“ estates both real and personal, with the pay-  
 “ ment of the said annuity so by me by this  
 “ my codicil given and bequeathed to my said  
 “ wife as aforesaid. In witness whereof I  
 “ have to this my codicil contained in four  
 “ sheets of paper set my hand and seal (that  
 “ is to say) my hand to the three first sheets  
 “ thereof, and my hand and seal to the last  
 “ sheet thereof, this first day of April, One  
 “ thousand eight hundred and fifteen.

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PAUL COBB METHUEN. L. S.

“ Signed, sealed, published, and declared,  
 “ by the said Paul Cobb Methuen, as  
 “ and for a codicil to his last will and tes-  
 “ tament, in the presence of us, who  
 “ have hereunto subscribed our names as  
 “ witnesses, in his presence, and in the  
 “ presence of each other,

“ JOHN MEREWETHER, Attorney, Calne, Wilts.

“ EDWARD M'KENSIE, butler to Mr. Methuen.

“ JOHN PEARCE, footman to Mr. Methuen.”

Mr. Merewether, the drawer of the codicil of the first of April, 1815, after detailing the circumstances which gave rise to that instrument, expressed his full conviction that the codicil was meant and intended by the deceased to take effect in the place and stead of his former codicil of the 10th of May, 1813 ;—the provisions of which, in consequence of the marriage of his daughter Gertrude with Sir Edward O'Bryen, were embodied in the codicil of the 1st of April, 1815. He deposed “ that the said last-mentioned codicil was prepared by

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him for that purpose ; and he was quite confident that the deceased so understood it, not only from the disposition made in the same codicil being in conformity with the deceased's intention, but also from his declared approbation thereof when read over and explained to him, and the satisfaction he expressed at the manner in which the deponent had contrived to meet his wishes."

*Adams and Phillimore in support of the codicil of the 10th May, 1813.*

*Swabey and Lushington contra.*

JUDGMENT.

Sir JOHN NICHOLL.

The question is, whether the codicil of the 1st of April, 1815, is to be considered as an addition to the codicil of May 1813, or as a substitute for and consequently revocatory of, it. The first instrument remains uncanceled, and there are no revocatory words in the second. It is contended that the Court has no power to inquire any further ; but the same rules do not apply in a case relating to the *factum* of a will which would apply if the inquiry were concerning the construction of it.

In the Court of Probate the whole question is one of intention :—the *animus testandi* and the *animus revocandi* are completely open to investigation in this Court. Suppose in a case of fraud, or in a case of error, the residuary clause is omitted, it may be inserted by the Court.

It is admitted that if there is doubt on the face of the instrument, the Court may admit parol evidence.

On the face of the papers it rather appears as if the testator intended one for the other;—it certainly is not absolutely impossible that the deceased might have intended to have increased the portions of his daughters, and the annuity of his wife ;—but circumstances render it highly improbable that he should so have intended. There is a strong probability that he intended it as a substitute, and not as an independent codicil. Evidence, however, being admissible, there can be no doubt whatever ;—the doubt, if any, is not from the intentions of the deceased, but from the mode Mr. Merewether has pursued in carrying them into effect ;—it is quite impossible there can be any mistake as to the widow. It is unnecessary to detail the evidence ;—there can be no doubt as to what the deceased intended, and what Mr. Merewether intended he should do. It would certainly have been better if Mr. Merewether had introduced an express revocation into the codicil ;—but, on account of an omission of that kind, is the Court to carry into effect that which is not the intention of the deceased? Other circumstances are strongly confirmatory of the intention ;—the personal property is not more than 3000*l.* or 4000*l.* Mrs. De Grey's legacy, therefore, must suffer defalcation; she would clearly have less than the other daughters, when the testator intended they should be equal. It is true that the deceased was expressly told that the former codicil was to be destroyed, and he did not destroy it ;—no immediate inquiry was made after it ;—there is reason to think it was not at that time

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in London;—it was found on his death in the drawer of his library-table, in Wiltshire, while the other testamentary papers were in a separate trunk. The strong probability is, that he never thought of the circumstance again;—it is difficult to entertain any doubt as to the real intentions of the deceased. The papers themselves lay a strong ground, and Mr. Merewether corroborates them. I pronounce for the will, and the other three codicils: but this codicil is not to be included in the probate.

I direct the expenses of this proceeding to be paid out of the estate.

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COLE v. REA.

The duty of  
a next of kin  
to take out an  
administra-  
tion.

**T**HOMAS REA died intestate:—six months after his death no administration was taken out to his effects, when a creditor applied for it. The next of kin then appeared, and prayed that the administration might be granted to him in preference to the creditor.

The Court was moved that the creditor should be allowed his costs.

**JUDGMENT.****SIR JOHN NICHOLL.**

It was the duty of the next of kin to have taken out this representation earlier:—the creditor has been compelled to take these steps to recover his debt ;—he is, I think, entitled to his expenses.

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Costs given.

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## ARCHES COURT OF CANTERBURY.

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*Nov. 3.*

LORD HERBERT *v.* THE DOWAGER PRINCESS OF BUTERA, falsely calling herself LADY HERBERT.

A caveat entered against an inhibition: the inhibition refused.

A CITATION was taken out in the Consistory Court of London, on the 11th of March, 1817, in a suit of restitution of conjugal rights, by Octavia, Dowager Princess of Butera, (born Spinelli,) asserting herself to be the wife of the Right Hon. Henry Robert Herbert, commonly called Lord Herbert.

On the 25th of April, (the first session of Easter Term,) the citation was returned;—a citation, *viis et modis* was then decreed; and on the 2d of May, (the second session of Easter Term,) that citation was returned. On the 9th of May, (the third session of Easter Term,) Mr. Addams, proctor, exhibited a proxy for Lady Herbert.

On the 6th of June, (first session of Trinity Term,) in pain of the contumacy of Lord Herbert, the proctor for Lady Herbert brought in the affidavit of Christopher Flood, setting forth "that he was clerk to Mr. Greenwell, vestry clerk of St. Mary-le-bonne; and that, on referring to the books



of rates kept in and for that parish, it appeared that the house, No. 10, Upper Seymour Street, has, from the quarter commencing on the 1st of January, 1816, and up to the present time, been rated in the name of the Right Hon. Lord Herbert, and that the several rates have been paid by or on behalf of His Lordship, and as and for his house or residence; and that it has been considered by the parish officers as his residence during that period."

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The Court pronounced Lord Herbert contumacious, and in contempt for not appearing; and a decree was taken out against him to see proceedings. On the 13th of June, (the second session of Trinity Term,) the proctor for Lady Herbert returned the decree, and a decree was taken out to see proceedings, *viis et modis*. On the 20th of June, (third session of Trinity Term,) the decree was returned, and the certificate was continued. On the 27th of June, (the fourth session of Trinity Term,) in pain of contumacy, the proctor of Lady Herbert brought in a libel and exhibits, and the Court assigned to hear on admission the next court-day. On the 4th of July, (the bye-day,) the proctor for Lady Herbert prayed the libel to be admitted. Bedford appeared as proctor for Lord Herbert, but *under protest to the jurisdiction*. The Court, under the circumstances of the case, directed the admission of the libel to stand over till the next Court: but gave leave to Lady Herbert to produce and examine witnesses *de bene esse*, and decreed a Requisition for the examination of witnesses and compulsories, to appear before the com-

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missioners and assigned the proctor for Lord Herbert to exhibit a proxy, and extend his protest next court;—on the same day Lady Herbert's proctor in pain produced a witness *de bene esse*, who was sworn. The proctor for Lord Herbert entered a protocol of appeal, and prayed an inhibition in the Court of Arches before a surrogate, which was decreed;—but, on applying to have it sealed, it appeared that a *caveat* had been entered against it by Lady Herbert's proctor, who had been warned before a surrogate;—the surrogate declined making any order, but referred the matter to the Judge. The *præsertim* of appeal, after the usual recital, stated that “*he (the proctor for Lord Herbert) hath from the same and every one of them, and more especially from a certain pretended order or decree made and interposed by the said Judge, on the bye-day after Trinity Term, to wit, Friday the 4th day of July instant, whereby Bedford has appeared for the party cited, but under protestation, and Addams having prayed his libel and exhibits to be admitted; and the Judge under the circumstances of the case directed the admission thereof to stand over to next court. The said Judge did further give leave to Addam's party to examine witnesses thereon de bene esse, decree compulsorics, &c. and afterwards on the same day did swear and admit a witness, notwithstanding no absolute appearance had been given on behalf of the party cited, and the protest under which his proctor had appeared had not been heard and over-ruled, or such jurisdiction judicially pronounced for, and notwithstanding the said libel and exhibits had not*

*been admitted to proof, and suit contested between the parties."*

The proctor for Lady Herbert transmitted the following statement to the Judge :—Addams, proctor for Lady Herbert, has entered a *capeat* against the inhibition passing the seal ;—and he contends that Bedford's party being pronounced in contempt, is, in the same state as if he had been excommunicated *in facie ecclesie*, and consequently is not entitled to be heard, even as to his protest, without appearing and tendering himself to take, and taking the oath to be obedient in future to the lawful commands of his ordinary, in order that, should his protest be over-ruled, he may be bound to appear absolutely ;—and paying the contumacy fees, and then being pronounced absolved from his contumacy and contempt. That this, therefore, being his state, he cannot claim the office of any ecclesiastical judge whatever ; and that he is in no wise before the court below, so as to have any right of being heard there, much less to appeal. Further, that Bedford having appeared only under protest as to the rest of the cause, it is in pain of him and his party, and, that he has nothing to do with it. If his protest is pronounced for, the whole falls to the ground ;—if not, he only suffers for his contumacy. Lastly, that the whole is so manifestly not an appealable matter, that the Judge will refuse his inhibition. The suit is for the restitution of conjugal rights, promoted by Lady Herbert v. Lord Herbert :—the marriage took place in Sicily, and it is highly important to her not to lose the vacation in proving her libel, as well as lest the wit-

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nesses should die; and, when Sir William Scott gave permission to examine the witnesses *de bene esse*, he observed that the opposition of Lord Herbert appeared to him to be merely for the purpose of vexation and delay.

The following directions were transmitted by the Judge to the registrar and the seal-keeper.

“The statement made to me in this matter having been made by the proctor of the respondent, to which the proctor of the appellant has declined to write, the circumstances of the case are not before me in sufficient form to warrant me in deciding whether the inhibition shall or shall not issue;—but, from what appears upon the face of the inhibition itself, (assuming the extract sent me to be correct,) and from a *caveat* having been entered against its issuing, I am of opinion that there is sufficient ground to induce me to direct that the proctor of the appellant shall observe the requisites of the 96th and 97th canons. When these requisites have been duly complied with, I will proceed upon copies of the papers being sent me, further to examine the whole matter; the proctor of the appellant being at liberty to offer such observations in writing as he may think proper for the purpose of shewing that the order made by the Judge of the Consistory is a grievance to his party. It will be proper that the appellant’s proctor should fully apprize his advocate when he applies to him for his signature to the inhibition that such application is made by the Judge’s direction under the special circumstances of the case.”

The following statement was transmitted by Lord Herbert's proctor.

"Mr. Bedford herewith sends to the registrar the papers required by the Judge, and begs leave to state that he declined writing in answer to Mr. Addams's statement, as he conceived the same to be irregular ; and the measure of interposing a caveat against sealing an inhibition is, as he believes, unprecedented ;—but, under the liberty allowed by the judge, he requests to observe that in this case there has been no personal service of any process. That the Consistory Court of London had decreed a monition to see proceedings by which the party was again called upon to appear : and, therefore, as he submits was entitled to do so, and to shew cause why he did not appear to the original mandates, which would be the subject of his protest against the jurisdiction as at first. That his counsel have advised on facts stated to them that he has good grounds to assert that the Consistory Court of London has no jurisdiction in this case. And he submits that it is a grievance to exercise any act of jurisdiction whilst a protest against it is depending, and especially such as are set forth in the *præsertim* of his appeal, allowing the other party to examine all his witnesses *de bene esse* without precedent as far as he can learn in any case, and without even any allegation that any one of the witnesses is in such circumstances, the proof of which is usually required to found such permission, viz. in old age, in infirm health, or other circumstances which occasion the danger of losing his testimony ;—whereby, if the cause should

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proceed, and issue be joined, the witnesses must probably be examined twice over. He takes leave further to state that the appeal was interposed by direction of his counsel for the substantial interests of the party, and for no purpose whatever of vexation ;—and humbly submits that his appeal is matter of right."

*The Order of the Judge.*

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The dean of the Arches desires the registrar, or in his absence the seal-keeper, will acquaint the proctors in this case, that having considered the copies of the proceedings transmitted to him together with the statements made by the proctors on both sides, he has directed the matter to stand over till the first day of the ensuing Term, when he will hear advocates on the question whether the inhibition shall or shall not issue.

The judge moreover transmitted to the registrar the following memoranda :

That no proxy was exhibited from Lord Herbert, or his contempt purged ; and required his proctor to produce a precedent of an appeal being presented on behalf of a party so situated or from my order, made *de bene esse*.—He required from the proctor of Lady Herbert a precedent of a caveat having been entered or of an inhibition refused.—He observed that he did not see any injury would arise to Lord Herbert as the inhibition might be granted before the first Consistory Court day ; and if proceedings should in the mean time be taken by the proctor of Lady Herbert, they would still be subject to the effect of the inhi-

bition if granted.—That the 97th canon inferred discretion in the judge to grant or refuse his inhibition.

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In the course of the long vacation the proctor for Lady Herbert extracted from the Consistory Court of London a commission to examine witnesses *de bene esse*.

*Arnold and Swabey for Lord Herbert.*

The right of appeal is highly favoured and held sacred under all systems of jurisprudence ;—fit grounds are established against the abuse of it by the liability of the party to costs, and by calling for the signature of an advocate ;—it is so considered in Chancery. (a)—In our Courts the signature of an advocate is directed by the 96th canon. Whether there is any further discretion in the Court it

(a) The 96th canon is as follows:—Inhibitions not to be granted without the subscription of an advocate.

That the jurisdiction of bishops may be preserved (as near as may be) entire and free from prejudice ; and that for the behoof of the subjects of this land better provision be made, that henceforward they be not grieved with frivolous and wrongful suits and molestations ; it is ordained and provided that no inhibition shall be granted out of any Court belonging to the archbishop of Canterbury, at the instance of any party, unless it be subscribed by an advocate practising in the said Courts, which the said advocate shall do freely, not taking any fee for the same, except the party prosecuting the suit do voluntarily bestow some gratuity upon him for his counsel and advice in the said cause. The like course shall be used in granting forth an inhibition, at the instance of any party by the bishop or chancellor against the archdeacon, or any other person exercising ecclesiastical jurisdiction ; and if in the Court, or Consistory of any bishop, there be no advocate at all, then shall the subscription of a proctor practising in the same Court be held sufficient.

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is not necessary to discuss : it is always considered with respect to laws not of recent enactment, that the best interpretation is to be found in the practice ; the practice has been constant ; there is no precedent of a refusal ;—we are not aware of any caveat against the issue of an inhibition having been entered before this. The practice has been invariable that the signature of an advocate has been sufficient. The advocate may be mistaken ;—but the question whether it is appealable is one of the incidents to be decided at the conclusion of the cause by the Court of Appeal.

One objection taken on the other side is that the party has been pronounced in contempt, and is not entitled to be heard. Contumacy is of two kinds, actual and presumed. The one where the party before the Court refuses some order, the other where the party refuses or declines to appear. What is the legal effect of such contumacy ? The Court proceeds in a regular and prescribed form ;—it proceeds in his absence, not by excluding him if he offers to appear ; but by calling him again to see proceedings with an intimation that if he does not appear, it will proceed without him ; but then he is not to be excluded if he comes.

Another objection is that the party has not been purged of his contempt ;—according to the ancient practice, subsisting indeed till the late act, (b) where a person was pronounced contumacious, he was excommunicated ;—the legal disabilities of which were that no one could hold commerce with

(b) 53 Geo. III. c. 127.



him ; and when he came before the Court it was necessary that he should be absolved, having not otherwise a *persona standi*. Absolution applies to excommunication only. Contumacy is purged by appearance, and he is made subject to costs. In this case the party appeared under protest ;—he was not excluded, but received ; and the Court assigned him to extend his protest. The citation was extracted on the 11th of March, in a process *viis et modis*. It was served on the Royal Exchange treating the party as if abroad ; from the 11th of March to the 4th of July is no extraordinary delay for a person abroad. He comes then to shew there is no jurisdiction, which would shew that there has been no contempt. It is asked whether there is any instance of an appeal brought by a party pronounced contumacious ? There is a difficulty to commence a search for precedents ; unless it should have been made a prominent point in the case. One kind of case is, when the complaint has been against the excommunication itself, as in *Acherly v. Oldham*, Deleg. 1811. (c) It is asked, Are there instances of an appeal from such a point as this ? To this the answer is, that there can be no instance of an appeal because there is no instance of an order for an examination of witnesses *de bene esse* ;—in the Courts of Common Law no such proceeding is known ;—and in Courts of Equity, the examination of witnesses *de bene esse* as here granted of all witnesses to be produced, is, according to any search and enquiry we

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have been able to make unprecedented. These witnesses may be examined, if they are likely to die : but then if they live, they must be examined again. Affidavit also must be made of the age and infirmity of the witness in such a case.—It is a grievance to do any act while the jurisdiction is disputed. In the Admiralty Court witnesses are sometimes examined *de bene esse* :—but that is a Court of peculiar jurisdiction ; and affidavits are always required that the parties so examined are going abroad. On this case also the jurisdiction is disputed by the protest, and it is a grievance to do any act whilst the jurisdiction is disputed.—We demand this appeal as a matter of right, not of form.

*Phillimore and Lushington for Lady Herbert.*

First, It is discretionary with the Court to grant or refuse the inhibition ;—this is to be inferred from the terms of the 97th canon, (e) which seems

(e) 97th canon. Inhibitions not to be granted until the appeal shall be exhibited to the judge.

It is further ordered and decreed, that henceforward no inhibition be granted by occasion of any interlocutory decree, or in any cause of correction whatsoever, except under the form aforesaid : and moreover that before the going out of any such inhibition, the appeal itself, or a copy thereof, (vouched by oath to be just and true) be exhibited to the judge, or his lawful surrogate, whereby he may be fully informed both of the quality of the crime and of the cause of the grievance, before granting forth of the said inhibition. And every appellant, or his lawful proctor, shall before the obtaining of any such inhibition, shew and exhibit to the judge, or his surrogate, in writing, a true copy of those acts, wherewith he complaineth himself to be aggrieved, and from which he appeal-eth ; or shall take a corporal oath that he hath performed his

to distinguish between an appeal from a definitive sentence, and from a grievance ;—and this is to be collected from the regulations laid down respecting the grant of inhibitions in the Canon Law, and the books of practice. X. 2. 28. 37. Maranta 6. 207. lib. 1. (f) Gail. Obs. 144. 4. 5. Ayliffe 297. (g) Gregorius Tractat. de Appella-

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diligence and true endeavour for the obtaining of the same, and could not obtain it at the hands of the registrar in the country, or his deputy, tendering him his fee. And if any judge or registrar shall either procure or permit any inhibition to be sealed, so as is said, contrary to the form and limitation above specified, let him be suspended from the execution of his office, for the space of three months: if any proctor, or other person whatsoever, by his appointment, shall offend in any of the premises, either by making or sending out any inhibition, contrary to the tenor of the said premises, let him be removed from the exercise of his office for the space of a whole year, without hope of release or restoring.

(f) Secundum regulam principalem non procedere quando fuit *judici a quo inhibitum* per superiorem: quia tunc non potest ulterius procedere in illa causa; quod tamen intellige quando inhibitio fuit legitime interposita, et cum causæ cognitione, et parte citatâ, nam quando est appellatum, in casu *in quo non debuit appellari*, vel quia causa est injusta, vel appellatio est *frivola* et frustatoria, tunc nunquam debet *judex ad quem, inhibere*, nisi prius adhibeat causæ cognitionem super justitiam appellationis, aliâs inhibitio non valet. Marant. Spec. Aur. 6. act. 2. sec. 207.

(g) In respect of an inhibition the judge ought to have a constat of the grievance, that he may know the truth thereof; for the causes of a grievance ought not only to be expressed in the instrument of the appeal, but also the truth of such grievance ought to be verified from the acts of the inferior judge, and from hence the judge *ad quem* ought to consider whether the cause be devolved or not: for as long as the cognizance continues before him, whether he ought to receive the appeal

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tionibus; lib. i. c. 10. lib. 2. c. 14. 2. Mandosius. de Inhibitionibus Qu. 25. Clarke 323. Though we have found no precedent for a caveat against an inhibition, yet it is so strictly analogous to the course in all ecclesiastical proceedings, and to the practice of all Courts regulated by the canon law, that it cannot be objectionable.

*Secondly*, If it is discretionary, this is a case in which a Court would not grant an inhibition;—these Courts are favourable to marriage. The danger of losing the evidence is obvious;—and the examination of witnesses *de bene esse* cannot be an appealable act. Maranta Spec. 6. 206. (h)

*Thirdly*, The party is in contempt, and cannot appeal;—his contumacy is not purged. Maranta 6. 14. Oughton 406. X. 2. tit. 28. 37. Gail. lib. 2. 14. 11. Mandosius de In. lib. 33.

*Arnold and Swabey in reply.*

The course of proceedings in these Courts in the absence of a party is not by examining witnesses *de bene esse*; but by taking a decree calling on him to see proceedings with intimation that otherwise the cause shall go on without him, and proceeding in it accordingly. Oughton 295.

JUDGMENT.

Sir JOHN NICHOLL.

This question is of a very unusual sort;—whether or not, and whether the cause be devolved or no, he ought not to inhibit the inferior judge. Ayliffe Parer. p. 297.

(h) *Judex à quo potest pendente appellatione examinare testes senes, vel valetudinarios ad perpetuam rei memoriam, et non dicitur innovare.* Maranta Spec. Aur. 6. act. 2. 206.

*Verus contumax non appellat.* Marant. Spec. Aur. p. 6. sec. 14.

ther an inhibition on an alleged grievance shall issue in the ordinary mode ;—the inhibition was stopped early in the long vacation at the seal by a caveat. I considered that as the first day of term in this Court occurred before the first sitting of the Consistorial Court, no injury could arise to the parties if I delayed to decide upon the point till I should be assisted by the learning, the arguments, and the information, of counsel.

However averse the Court may feel to any innovation in practice, (for in modern times an inhibition has issued almost as matter of course,) it by no means follows that, under particular circumstances, it may not be right and proper for the judge to consider and decide judicially whether he shall decree an inhibition ;—if there was not some such mode, great vexation and injustice might be done ;—many formalities of practice are not observed in ordinary cases,—but they may be called for. The signature of an advocate to an inhibition may not be called for in ordinary cases ;—but it may be and it is specially required by the canon. What is expressly required by the canon is not repealed by disuse : the Court is to see whether it is necessary for the purposes of justice in the particular case.

The 96th and 97th canons apply directly to this question ;—by the 96th no inhibition can issue without the subscription of an advocate ;—by the 97th it must be exhibited to the judge. The reason pointed out for this is, “ *that he may be fully informed both of the quality of the crime, and of*

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*the cause of the grievance, before the granting forth of the said inhibition."*

The 96th is to preserve the jurisdiction unimpeached.—To prevent frivolous suits, the subscription of an advocate is necessary, which applies to all cases civil and criminal, to appeals from a definitive sentence, and from a grievance.

Sacred as the right of appeal, and comfortable as the rule is, to all persons having to exercise jurisdiction, the law takes care it shall not injure either the jurisdiction or the suitor.

The 97th canon points out particular regulations for particular cases, as with respect to an interlocutory decree, or in causes of correction ; and moreover it requires that the appeal should be exhibited to the judge.

The signature of the advocate is not sufficient ; —it must be exhibited in order that the judge may be informed of the quality of the crime, and the nature of the grievance. Surely then it is not without any discretion of the judge :—it is not a mere right, however vexatious it may appear on the acts submitted to the Court.—On sound considerations of justice the judge must exercise his judgment whether it is such a grievance as would justify him in tying up the hands of the Court, whence it is brought ;—though there may be but few cases, and those under extraordinary circumstances, in which the Court would refuse it. Though in ordinary practice no question is made on granting an inhibition, and reluctant as I must feel to withhold it, still I am of opinion that the Judge must

exercise his judgment on the point, and decide whether there is sufficient ground to issue his inhibition.

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I come now to the consideration arising from the facts, as they appear on the acts of Court which have been exhibited :—The nature of the act, complained of as a grievance, is to be collected from the acts of the court below. From those acts I collect the following circumstances :—In the first place, it occurred on the last sitting of Trinity term before the long vacation in a suit brought by the wife against the husband ;—the cause stood on the admission of the libel and exhibits ; and the certificate by ways and means was continued. I collect also, that the suit was *in panam* against the husband ;—that he had been pronounced to be in contempt. No absolute appearance was given for him on that day ;—the act entered is as follows :—“ *Bedford appeared for the party cited ; but under protest.* Addams prayed the libel to be admitted. The Court, under the circumstances of the case, assigned the admission to stand over till the next court, but allowed Addams to examine witnesses *de bene esse*, and *in pain* admitted a witness to be produced.

The ground of Lord Herbert's appearance, therefore, was not to see proceedings, but solely to deny the jurisdiction of the Court, which was not determined as it is alleged in the *proassertum* of the appeal. His only purpose was to protest against that jurisdiction ; denying that the Court could entertain the proceedings. By the acts of Court it appears that no proxy had been pro-

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duced :—he was assigned to produce it at a future time ;—no notice of the contumacy had been taken ;—nor had the party appeared and purged himself from it, and expressed his readiness to pay the usual fees.

The Judge takes no absolute steps ;—he directs the libel to stand over, and the witnesses to be examined *de bene esse*, in order that their testimony may be used hereafter, if the cause will admit of it. The whole of this takes place on the last day of Trinity Term ; and from the way in which the cause is set out the Court may fairly collect that the question at issue is respecting a foreign marriage. The Judge of the Consistory does not admit the libel ; he merely admits the examination *de bene esse*. If there had been no interposition on that day the libel would have been admitted ;—and the wife's witnesses would have been examined during the vacation.

The question then is, whether a proctor merely coming in on the last day, with a protest against the jurisdiction, without taking one step in the principal cause, is to call upon this Court to say that the Judge did wrong in directing the witnesses to be examined ; those witnesses too being resident in a foreign country. This Court has the complete *gravamen* now before it ;—and if it were to issue its process to inhibit, it could not be more instructed as to the nature of the *gravamen* than it now is. —Lord Herbert's only purpose was to try the jurisdiction ;—not to enter on the principal point in the cause : if so, no injury is done to him.

Whether being put into contempt precludes



questioning the jurisdiction I shall not now decide :—but the question is, whether I shall stop all proceedings by this objection to the jurisdiction. The Court, I think, would have been justified in considering this as no appearance. Where a party denies the jurisdiction, he would not be allowed in the principal cause, in which he has never appeared, to appeal from a step in the principal cause.

I am inclined to hold that there is no *gravamen* from which the party had a right to appeal ;—it is less necessary, therefore, to decide whether a party in contempt can appear before he has purged his contempt :—he was assigned to extend his protest against the jurisdiction, and it was *in pain* of his non-appearance that the witness was examined.

In the next place there is no proxy. It was the duty of those who communicated the proceedings to Lord Herbert to send over a proxy with them. What *constat* was there in the Court below, that the proctor was authorised to appear for Lord Herbert ;—that it was not a delay by another person.

'I have considerable doubts whether the Judge was not at liberty to have proceeded as if no opposition had been given.

The Judge proceeded with all possible caution ;—he does not even admit the libel ;—he withholds the admission of it to give the party an opportunity of objecting to it ;—but he admits it *de bene esse*, in order to prevent injustice from the witnesses residing in a foreign country dying during the long vacation. Their evidence is to be admitted *de bene esse*, i. e. provisionally, and subject to all legal

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objection ;—there would have been a great failure of justice if the Consistory Court had not done this ; as there would be if this Court were now to grant the inhibition. If the party proceeded against can shew irregularities or nullities in the examination of the witnesses ;—if he can shew the libel to be inadmissible, it will be open to him to do it. Lord Herbert has all the advantages,—he may object to the admission of the libel ;—to the jurisdiction ;—to all the proceedings.

It is still open to the Court hereafter to suppress the depositions ; and if any opportunity of re-examining the witnesses occurs, they may be re-examined. If Lord Herbert had prayed, that without prejudice to his protest he might have interrogated the witnesses, he might have administered interrogatories to them.

From the nature of the cause every delay is injurious ;—the suit is brought by a foreigner ;—it respects a foreign marriage ;—and the Court is never to forget that it is a suit to *establish* a marriage.

Though I am extremely reluctant to stop the proceedings on an appeal, and to give a novel appearance to a case of practice ; yet, under all the circumstances of this case I am not, I think, departing from the principles of the Court if I refuse this inhibition.

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## PREROGATIVE COURT OF CANTERBURY.

KINLESIDE v. HARRISON.

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April 23.**JUDGMENT.**

Sir JOHN NICHOLL.

The question in this case arises on several testamentary papers of Andrews Harrison, deceased ; —he died in the month of February, 1816. He made a will and several codicils :—the will and the four first codicils are not opposed ; the other codicils are contested. The latter codicils, which are contested, are set up on the one part by Mr. Kinleside, who is one of the executors and the residuary legatee named in the will ; and they are opposed by Mr. Benjamin Harrison, whose appointment as an executor under the will, and the benefits given to him in the will also, are revoked by these codicils.

*The criteria by which the capacity of a testator is to be examined ; —especially where there is a mass of contradictory evidence ;—where the testator is far advanced in years,—and where occasional incapacity from violent nervous attacks, is admitted,—the mere opinion of witnesses of little weight.—Capacity established.—Costs refused.*

To render the grounds of decision intelligible, it may be necessary to state the outline of the several testamentary dispositions. The will bears date in the month of June, 1808 ;—it is very long and complicated ;—drawn up by a professional gentleman ;—it occupies twelve brief sheets of paper,

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and was executed in the presence of three witnesses : it has in view two contingencies ;—one, the case of the testator dying before his brother, Mr. John Harrison ;—the other, the contingency of his surviving his brother. It gives a great variety of legacies to friends, to relations, and to servants ; some of them pecuniary legacies, others of them stock legacies in the long annuities, and respecting a part there is a trust raised. The deceased had a small real estate, consisting of Shawfield Lodge, at Widmore, near Bromley, in Kent ; and he had also a very small property in Derbyshire. Shawfield Lodge is given to trustees for the brother, Mr. John Harrison, for life, with a power to dispose of it by will or deed ; but in case he made no disposition of the property, then Shawfield Lodge, except Mrs. Jukes's house, which I shall have occasion to notice hereafter, is given to Mr. John Harrison. The small property in Derbyshire is given to Mr. Roe, and the residue of his personal estate is given to his brother, Mr. John Harrison ;—and in this event the executors appointed are Mr. John Harrison, Mr. William Stanley, and Mr. Paul Malin. Thus far the will looks to the event of his dying before his brother :—it then goes on to provide for the other event, of his surviving his brother ; and in that case, without revoking any of the previous legacies, gives a variety of additional legacies ; among others, a legacy to Mr. Paul Malin of 18,000*l.* ;—raises a long and intricate trust for the children of Mr. Taylor ; gives pecuniary legacies to the amount of 40,000*l.* ;—gives Shawfield Lodge to Mr. Ben-

jamin Harrison, except Mrs. Jukes's house ;—her house, and fixtures, and furniture are given to trustees for her use during her life, and then that house, and fixtures, and furniture are to go to Mr. Benjamin Harrison. The furniture and plate, and other articles at Shawfield, are given to Mr. Benjamin Harrison, and the residue is then given to Mr. Kinleside ; and in this event the executors are Mr. Benjamin Harrison, Mr. William Kinleside, and Mr. Paul Malin, so that Mr. Malin was an executor in both events, but Mr. Harrison and Mr. Kinleside were only executors in the event of his surviving his brother. The deceased's brother, Mr. John Harrison, made a will at the same time, and upon similar principles, though not precisely the same in all respects, for several of the legacies are considerably different ;—but Mr. John Harrison had no real estate to dispose of ;—he does not make any disposition whatever in respect to Shawfield Lodge ;—he would take no legal estate in Shawfield Lodge, except in the event of surviving his brother, and then he would have a power of disposing of it.—This is the substance of the will.

The first codicil is dated in June, 1809, and by that Mr. Benjamin Harrison is appointed an executor in both events, even if Mr. John Harrison should survive his brother.

The second codicil is dated in February, 1810 ;—it gives some additional legacies ;—one of 300*l.* to Mr. Walmsley, 100*l.* to Mr. Roberts, and it recites that the deceased having, with his brother, given up a bond of 12,000*l.*, and a note of 1000*l.*, together with all the interest thereon, to Mr. Paul

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Malin ;—it revokes the legacy of 18,000*l.* given to Mr. Paul Malin, and substitutes in the place of it a legacy of 5000*l.* ;—it also, in the case of his brother John dying first, gives the books and pictures at Shawfield to Mr. Benjamin Harrison, provided the residue amounts to 11,000*l.*, otherwise those books and pictures are to be a part of the residue to go to Mr. Kinleside.

The third codicil bears date in October, 1810 ;—by that the furniture and books and pictures in Mrs. Jukes's house are given to her absolutely.

The fourth codicil bears date in September, 1811, and contains three additional legacies of 500*l.* each.—The brother, Mr. John Harrison, made similar codicils to the two first of these four, but he made no codicils to correspond with the latter of these four.—These are the uncontested dispositions.

The four contested codicils are to the following effect :—the first of them, which is marked with the letter F, is dated in August, 1812 ;—it is written in the margin of the codicil of February, 1810, and is attested by Mr. Boodle and William Taylor, and by that, the books and pictures at Shawfield Lodge, after the death of his brother John, are given to Mr. Trevillian :—however, this codicil is embodied in the next, which the Court is going to state ;—it is marked with the letter G, and bears date the 2d of September, 1812, two days afterwards :—it is attested by Mr. Boodle, William Taylor, and William Coleborn, and revokes the appointment of Mr. Benjamin Harrison as one of his executors, both in the event of his dying in the

lifetime of his brother, and in the event of his surviving his brother;—and it appoints Mr. Kinleside an executor in both events: it revokes the bequest of the books and pictures to Mr. Benjamin Harrison, and gives them to his brother for life, and then to Mr. Trevillian.

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The third codicil bears date the 21st of March, 1814, and is in the deceased's own hand writing, signed by him, but not attested by any witness: and it declares his wish to give Shawfield Lodge estate and premises to his residuary legatee, the Rev. William Kinleside, and revokes the legacy left to Mr. Paul Malin.

The last codicil, which is in duplicate, marked I and K, bears date the 27th of April, 1814, one of the duplicates, that marked I, being in the hand-writing of the deceased himself, and attested by three witnesses; it revokes all the devises and bequests given to Mr. Benjamin Harrison and Mr. Paul Malin, and it revokes their appointment as executors;—it revokes the bequest of the books and pictures to Mr. Trevillian, and gives all the property at Widmore, and all his plate, china, and also the books and pictures, live and dead stock whatsoever, to Mr. Kinleside; and it again appoints Mr. Kinleside the residuary legatee and devisee.

These are the contested instruments, and the dispositions contained in them.—As all these instruments, upon the face of them, are regularly executed and attested, and are admitted to have been signed by the testator, and witnessed by the several persons whose names are subscribed to them, it may appear proper to examine, in the

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first place, the grounds upon which the execution of them is to be impeached, before the Court can well estimate the weight and force of the evidence which is offered in support of the execution. ' .

The grounds of opposition are of two sorts :— the first, that the deceased laboured under mental imbecillity, so as to be utterly incapable of any testamentary act whatever ; the second is, (but which applies to the two codicils only) that they were obtained from the deceased by fraud, and circumvention, and importunity.

The material parts of the plea, detailing these grounds of opposition, are to this effect. Mr. Benjamin Harrison, in the fifth article of his allegation, states that about 1812 the mental faculties, and especially the memory of Mr. Andrews Harrison, had become weakened from his great age, and the general decay of nature, and, about the middle of that year, were so much impaired as to render him incapable of comprehending the state of his affairs, or of recollecting those about him, or of understanding what passed in conversation ; —that the deceased was, from that time to the time of his death, childish and incapable of the management of his affairs, and was so considered and treated by the said Sarah Jukes, and the other persons about him ; and in consequence thereof, the servants and all others, from that time down to the time of his death, used to apply to Mr. Kinleside or Mrs. Jukes for orders. The deceased had lost the knowledge and recollection of his friends and acquaintance, and when any person called, it was necessary to explain who they were, otherwise



he could not recognise his most intimate friends ;— that he frequently got up in the middle of the night and lighted his candle, and would suffer it to burn out in the socket ;—that he would frequently make water in the fire in the presence of Mrs Jukes, being utterly unconscious of the impropriety of so doing ;—that he was unimpressed by the death of his brother, which took place in November, 1813 ; that he took very little notice of it, and was in no degree moved or affected thereby ; and then it goes on to state other circumstances, shewing entire incapacity in the deceased.

The second ground which is set forth in a subsequent article is, that Mr. Kinleside, Mrs. Jukes, and Mr. Wells, repeatedly urged and pressed the deceased to give the Widmore estate to the Rev. William Kinleside, and particularly after the death of his brother John Harrison ; that for that purpose a Mr. Latter drew up a codicil without any instructions from the deceased ; that the deceased being pressed to make a copy, did so, after repeated attempts, and at different intervals, with the assistance of Mrs. Jukes, although he was incapable of understanding the meaning and import of it, and that, on the day of the execution, he was not of sound mind, nor capable of making a codicil.— So that, according to this plea, here was entire incapacity in the first place ; and, in the second place, here was importunity, by which this instrument was obtained from the deceased:

In answer to this it is pleaded, on the part of Mr. Kinleside, in support of the capacity, that the deceased had for many years been subject to

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nervous attacks ; that the effect of those attacks sometimes continued for a few minutes only, but at other times for some hours, and that, except when under the influence of such attacks, the deceased was at all times, in the years 1812, 1813, and 1814, and down to the time of his death, of sound mind, memory, and understanding,—knew his friends,—conversed with them,—corresponded with Mr. Kinleside and other friends,—every day read aloud to Mrs. Jukes the Psalms, and Scriptures, and Lessons of the day,—drew drafts,—entered his accounts in a book, all which accounts are exhibited,—played cards, and so on, and was fully capable of making the several instruments which are opposed.

These are the cases set up on both sides ;—and, in support of the different pleas many witnesses have been examined, and their depositions contain one of the largest bodies of evidence that has ever been exhibited in these courts.

From what has been already stated, it is obvious that the leading point in the cause is the deceased's capacity. To all persons who are in any degree conversant with proceedings in this court, it is well known, that upon the point of capacity, evidence apparently the most contradictory frequently occurs ;—nor is the circumstance difficult to be accounted for, without imputing to either set of witnesses intentional falsehood ;—and certainly it is the duty of the Court to endeavour in candour to reconcile apparent contradictions, rather than to attribute perjury to those who are called upon to give evidence before it. In the first place, it may be observed, that a large portion of evidence to

capacity is evidence of mere opinion ; and upon matters of opinion mankind differ, even to a proverb. In the next place, there is no fixed standard by which each witness fixes and estimates his opinion of capacity ;—one person, seeing a testator in extreme age, or under extreme sickness, thinks, that if he knows those about him, and can answer an ordinary question with respect to the state of his illness, or of his wants, such and similar matters render him capable of giving effect to a disposition by will, however complicated it may be, by the mere formal execution of the instrument ; while another person may be of opinion that though a testator is in the ordinary management of his own affairs,—can hold reasonable conversation,—can fully comprehend all the usual and simple transactions of life, yet if he is unable to take the active management of all his concerns, however complicated those concerns may be, or if he is liable to become confused by entering into intricate transactions, he is totally incapable, and cannot enter into a testamentary disposition, however plain and simple it may be. Now, where opinions are formed by such different standards, it is obvious that much variety must take place.

Differences will also arise from other causes :—first, from the different abilities of witnesses to form such opinions ;—secondly, from their different opportunities of seeing the person ;—and, thirdly, from the different state and condition of the testator's mind at different times. It is certainly true that the study of the human mind is an abstruse science ;—the different lines and traits of the un-

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derstanding are matters which attract the notice and consideration of the intelligent ; ignorant persons and enlightened persons will form very different opinions upon subjects of this kind : ignorant persons, servants, and those in their condition, who form their judgments in the conversation of the kitchen circle, are very apt to form erroneous opinions on matters of this sort ; and this will be the case, even without throwing in the additional ingredient which takes place in those circles, the loose suspicious and prejudices by which their judgments are often biassed and carried out of their true course. In the next place, from the different opportunities persons have of judging they will form different opinions : persons who see a testator only occasionally will form different opinions from those who have better opportunities of judging. We know that little appearances occurring in this way are extremely fallacious, yet we often find occasional observers depose with great confidence. It frequently happens that the most ignorant are the most confident. In this case we have an under gardener speaking of the deceased, who was always deaf, sometimes nervous, and whom he only sees in the garden, but seldom converses with him, yet venturing to swear, (truly, I have no doubt in his own opinion) that he is *quite certain* the deceased was not capable of making a codicil during any part of a particular month, which happened three years before his examination.—This kind of opinion is still more various where the testator's capacity is fluctuating,—where he is sometimes better and sometimes worse ; and this is generally the case

with persons labouring under old age, or other infirmities ; it is so, even where there is no special attack occasionally operating ; accidental cold, or other indisposition, often renders an old infirm person worse one day than another ; after a good or bad night a person will be alert or dull ; so after a night's sleep, a person may be active and capable of considerable exertion even in matters of business, who, in the afternoon, while the process of digestion is going on, shall appear drowsy and torpid, and not able to rouse himself into action. The humour of a testator will also sometimes make him apparently almost fatuous, or induce him to rouse himself into exertion, as the occasion is either interesting or disagreeable to his inclinations. Now, these different considerations, (and they might be much more spread) while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the Court to weigh such evidence with very great attention—to rely but little upon mere opinion—to look at the grounds upon which opinions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather than by the judgment of others. These preliminary observations may, by being applied to the evidence, save the time and trouble of repeating them when the depositions come to be stated.

In this Court it has been usual, in such cases as the present, where there is a contrariety of evidence upon a variety of different transactions, to state the depositions pretty much at length, in order to shew more distinctly the grounds upon

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which the court decides ; but really, in the mass of evidence in this case, it is hardly possible to state any considerable part of it, which can bear any proportion at all to the whole. The utmost that the Court can do is, to state such general outlines and leading features of the depositions as shall pretty much shew the complexion of the evidence. This I shall endeavour to do as much as possible in the terms used by the witnesses themselves, proposing, first, to consider the evidence as to capacity and its result, and then to examine the proofs of the factum and the charges of fraud which are imputed in the course of that evidence.

There are some facts however which, without reference to the evidence, may be stated historically, they being assumed and admitted on both sides, and not liable to controversy. The deceased and his brother Mr. John Harrison, had been in business together in London, from which, having made a fortune, they retired to Widmore, in the county of Kent. The deceased, who seems to have been at all times rather averse to the trouble of housekeeping, resided with the uncle of Mr. Wells, at Bickley ; Mr. John Harrison living at that time in a small house in the neighbourhood. Mrs. Jukes, whose husband I think was cousin to the deceased, and had formerly lived at Bickley, upon the death of her husband, was invited by the deceased to return to that neighbourhood, and reside in a house he took for her residence. In the year 1809, the deceased left the house of Mr. Wells, and went to reside with Mrs. Jukes, where he continued till the time of his death. Soon after

his going to live at Widmore with Mrs. Jukes, the place was on sale, the deceased purchased it, and on a part of it he built Shawfield Lodge, which was intended for the joint residence of himself and his brother. His brother went to reside in it, but the deceased continued to reside with Mrs. Jukes. Mr. John Harrison inhabited Shawfield Lodge, down to the time of his death in 1813; he having, about two years before his death, through age and infirmity, been reduced to childishness and imbecillity, and during the period of that childishness and imbecillity the deceased managed the money concerns of his brother, Mr. John Harrison, and furnished money for his purposes; but the more immediate business of Mr. John Harrison, paying his bills, looking over his accounts, and other matters of that sort, was executed first by Mr. Paul Malin, and afterwards, from the beginning of 1813, by Mr. Kinleside. Mr. John Harrison made a will much to the effect of that of Mr. Andrews Harrison, leaving many legacies, but leaving the residue to his brother Mr. Andrews Harrison; and in November 1813, Mr. Andrews Harrison took probate of that will with the other executors, and survived about two years and a quarter.—Such is the outline of his history.

There are some other particulars which admit of no controversy; he was the elder of the two brothers, and he had attained the very unusual age of about ninety, so that he was from eighty-six to eighty-eight when these codicils were made: a great age, exceeding even the age when we are told that “the strength of man is but labour and sorrow.” This raises some doubt of capacity, but only so

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far as to excite the vigilance of the Court ; for the law allows a person at any age to make a will, provided he retains the disposing faculties of his mind. Age is an uncertain criterion of mental powers ; for those powers are often retained by persons even above that age in a greater degree of perfection than they are by others, twenty years less advanced in life, who may yet have no other apparent infirmities than those of age. The deceased must have had rather extraordinary faculties for his age, if we look to nothing but the will itself, which is not controverted ; he was eighty-two then ; it is a most complicated disposition of personal property ; it is made by Mr. Boodle, who is a very cautious and respectable solicitor, and who would not interfere further than was necessary to carry into effect the intentions of the deceased ; and yet we find that the deceased, at this very advanced age, with only this cautious assistant, is able to frame this very complicated will ; of that will, however, these codicils contain very considerable alterations ; and when a person in a very advanced stage of life makes considerable alterations in an instrument solemnly and cautiously made, the circumstance tends further to excite the jealousy and vigilance of the Court, and such an alteration claims still further attention, where the will itself is made in some degree as a sort of reciprocal will, in conjunction with a brother, with at least a full communication of their intentions, each providing for the event of surviving the other.

Now, though it is admitted, that this circumstance imposed no legal obligation upon the survivor, of not making any alteration—that there



was no express condition of any kind between them;—nor, as it will appear by the evidence, was there a distinct understanding to that effect; yet, though it imposed no moral obligation upon the survivor not to make any alterations, it would at least induce him to proceed with extreme unwillingness, to alter those dispositions which had been settled between him and his brother, unless there should occur some rational cause for such alterations; but, beyond this length, I never could understand the reasoning, which was so much pressed at the bar, both upon the admission of the allegation, and afterwards, on the hearing of the cause, upon this point, and which seems to have made some impression upon the parties themselves, as well as upon some of the witnesses who have been examined. For, on the other hand, if there did, in the opinion of the testator, exist a rational cause for making an alteration, he would not only consider that he had a moral right to do it, but he would have thought that his brother would have concurred as much in that opinion, as that he entertained it himself; for, as the witnesses state, they were most affectionate and confidential, and “had but one mind;” and, therefore, he would naturally conceive, that his brother, if he knew the circumstances, would accompany him in the alteration upon those rational grounds which existed for the making of such alteration: for example, as occurs here; each had, in case of being the survivor, given to Mr. Paul Malin 18,000*l.*, they afterwards gave up to this young man a bond and note for 13,000*l.*; they then each of them

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reduced his legacy to 5000*l.*, and each of them, in the reduction of that legacy, (for it is so declared in the codicil itself) looked to the residue being at least 11,000*l.* Now, if after the death of either, or if after the incapacity of either, Mr. Paul Malin had, by a further bond, incurred a further debt of 5000*l.* in the life-time of the party, which debt was given up to Mr. Paul Malin, or was lost through his bankruptcy, by which he would in fact receive his 5000*l.*, and by which loss, if the legacy was also to take place, the residue might be reduced to 6000*l.* instead of 11,000*l.* would not the survivor say, it was neither my brother's intention nor my own, that Mr. Paul Malin should have the sum of 5000*l.* in our life-time, and the residue be reduced to 6000*l.*; and, therefore, in rescinding and revoking the legacy, I am not only doing what I the survivor think just, but I am carrying into effect the intention of my deceased brother also. In an alteration of this sort, or any other alteration, he might conceive he had rational grounds for making it, and in which he might therefore conceive his brother would concur. I can see nothing which imposed on him a moral obligation, or made him unwilling to make the alteration. But at last this is a mere circumstance of inference and probability, bearing on the capacity; for if the capacity and volition are proved, the legal right to make the alteration is not at all denied.

Another fact not controverted, is the occasional incapacity of the deceased; arising from certain nervous attacks, coming on at different times, and

their effects of different durations ; and during those attacks it is admitted the deceased was incapable of any rational act. This circumstance, however, bears upon the case in two opposite directions ; it renders, in the first place, the capacity at least fluctuating, and imposes on the party setting up these instruments, the obligation of proving that at other times the deceased was capable, and that these instruments were made during that capacity ; but, on the other hand, if these attacks produced only a temporary incapacity, and the deceased was at other times in full possession of his mental powers, these occasional attacks account for the opinions of many of the persons who only saw the deceased occasionally, and take off, therefore, much of the effect and weight they attribute to the instances they adduce. This consideration also renders it the less necessary for the Court to enter into the particular instances of the deceased's not knowing persons, or beginning to undress himself in the day-time, or other circumstances of this sort ; for, it is admitted, there were times in which the deceased was in a state in which he did not only not recollect, but could not be made to understand persons or things, the degree in which he was affected being different at different times. That the deceased was subject to considerable deafness is also admitted. This defect always makes a person appear to disadvantage in society ; and to accidental observers, not being able to hear every thing that passes, he appears dull and stupid, and is in reality less excited and entertained in company than other persons ; yet such a person may,

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when he does hear, perfectly understand, and be able to converse quite rationally. The deceased was nervous and low spirited when any thing affected him.—If then we picture to ourselves a person approaching to ninety years, deaf and nervous, walking in his garden or in his immediate neighbourhood, such a person meeting the observations of those who occasionally saw him, would not make a very favourable impression as to his capacity ; while it might be, that, if he entered into conversation with them, he would shew that he was in possession of considerable mental powers. Some of his bodily powers were very good, except when under these attacks ; his health was good, and he was so alert he could run up stairs, which he sometimes did, to avoid Mrs. Jukes's visitors, who he did not wish to see, being rather a shy man. His eye-sight was perfect, therefore, his not knowing persons did not arise from any defect of sight ; he read the newspaper, and the psalms, and the lessons of the day without spectacles, and wrote a fair hand to the time of his death.—Now these facts are so clear they cannot be controverted ; and having stated them and the way they bear upon the case, the Court will now proceed to a review of the evidence upon the great controverted point of the capacity of the deceased,—or, as it is more technically described, his mind, memory, and understanding, and his competence to do any act requiring thought, judgment, or reflection.

In support of the plea alleging all these facts, thirteen witnesses have been examined ; seven of those were either servants of Mr. John Harrison,

the brother, or persons in that condition of life, three others are gentlemen, acquaintances of the deceased, who visited him occasionally, and the remaining three were the maid-servants of Mrs. Jukes.

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The first witness examined is Mr. William Tatton; he lived as butler to Mr. John Harrison for thirty-five years, and he deposes to incapacity pretty nearly in the terms of the plea, and in some instances perhaps beyond it, for he carries it further back; he says "he does not entertain any doubt that the deceased's memory and mental faculties had become so weakened from great age, that in or about 1812, he was incapable of comprehending the state of his affairs; he could for the most part understand what passed in conversation at the time, but could not retain it, his memory was so exceedingly impaired at particular times; on occasions, which occurred frequently, he could not understand any thing, but was quite lost and childish, and nine times out of ten the deceased did not know any person unless he was told who it was, and excepting those who were constantly about him, and in attendance on him. He has seen him at Shawfield, when he would walk through the house and about the garden without speaking a word to any one; that when he did speak it was commonly not more than to ask 'how is my brother?' he would burst out crying, as frequently as not, and appeared to be very gloomy and unhappy, but which the deponent supposed to proceed in a great measure from his seeing his brother in the state in which he was; that from the beginning or middle of 1812, the deceased was in

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a very childish state, incapable of the management of his affairs, and from that time he continued to grow worse, down to the last time the deponent saw him, which was about a month after the death of Mr. John Harrison ; there were intervals during which the deceased did know what he was doing, but they were of very short duration, and though he knew what he was about at the time, his recollection of the past was very deficient. The deponent was very little down at the house of Mrs. Jakes, where the deceased lived ; he never went there except when sent on a message. In 1812 the deponent had the care of the domestic concerns at Shawfield ; the deceased used to ask him for his book of weekly expences, which he would lock up, without looking at, and keep it for two or three days, till, as happened sometimes, Mrs. Jenkins, a neighbour, came to Shawfield, and she looked it over and told him it was all right, and then he returned it to the deponent." He says upon the ninth interrogatory " that he never settled an account with the deceased : Mr. Kinleside always settled with the respondent during 1813, though he might have received money from him between Mr. Malin's accident and Mr. Kinleside's taking the management, which was the beginning of 1813, he believes he did receive either a draft or bank note from the deceased, but he does not remember having received either from him at any other time ; there was no more business transacted between him and the deceased than that the deceased's man would tell the deceased that the respondent wanted money, and

when the deceased came up he would bring it." He says upon the second interrogatory, "that soon after the death of the testator, the producent told the respondent, that he meant to dispute some parts of the deceased's testamentary papers, and he asked the respondent if he remembered some general circumstances, and if he did he should call upon him. He has seen the producent twice since, who afterwards wrote to the respondent to request him to get the witnesses together at Bromley, on Monday last, and to get Fuzzey to Bromley on the Saturday before, and to get lodgings for the examiner;" and this witness, who is vouched, Fuzzey, says, on the second interrogatory, "that Tatton sent to him one day last year to come to his house to meet the producent, who then asked him some questions similar to those now put. He does not now remember very particularly what then passed, but he thought the business at an end, till one day last week, when Mr. Tatton desired him to meet the producent again at his house."

Certainly, in the judgment of this man, Tatton, the deceased was incapable of making his will, but there are some circumstances in his evidence, which makes the Court rather hesitate in concurring in his opinion, however sincere he may be in giving it. From his answer to the second interrogatory, which has just been stated, it appears, that soon after the death of the deceased, he was employed as a sort of agent, and that he is again employed for the purpose of collecting the witnesses together: this is very apt with persons in his condition in life to create a sort of

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bias upon the judgment. He principally forms his opinion from seeing this old gentleman coming to Shawfield, much distressed at his brother's illness, walking through the rooms or about the gardens, and not conversing with him;—the deceased seldom asking him any other questions than how his brother did, or for his book of accounts. He ventures, however, upon these means of knowledge, to depose to some of these points. He says, he was seldom at Mrs. Jukes's, and never went there except when sent on a message; and yet he ventures to depose that the deceased, nine times out of ten, did not know any person unless he was told before hand who it was. Now, how Tatton could know this, who, perhaps, was not present once in twenty times, when any of the deceased's friends approached him, it is difficult to conjecture. Again, he says, that the deceased asked for his book of weekly expences, which he would lock up without looking at, till he had an opportunity of consulting some other person upon the correctness of his book. Now, how should the witness know this; the deceased kept the book two or three days; it is proved that he transacted his business in his own room, at Mrs. Jukes's; and, therefore, the witness could not know whether he judged of the book from his own consideration, or the assistance of any other person. He says, that he might receive one or two drafts in 1812, but that in 1813 he did no business with him; but it comes out in a further part of the interrogatories, that when Tatton wanted money, he used to tell the deceased's servant that he wanted



money, and that the deceased when he came up to Shawfield would bring it. It so happens that in this very year, 1813, when the witness says he received no draft at all from the deceased, here are no less than sixteen drafts drawn in favour of Tatton ; three only out of the sixteen are filled up by Mr. Kinleside, the others are filled up by the deceased, and they are all signed by him. In the year 1813, Mr. Kinleside was at Shawfield but a small portion of his time ; the witnesses, Peebles, Hope, and others, state that he would come there and stay from Monday till Saturday ; he was a clergyman, residing in Sussex, and having a living to take care of there, he would stay at Shawfield four or five days together, and then be absent three or four weeks. By his filling up the draft it should appear, there was no clandestinity in his acts ; and, therefore, it is extremely probable the other drafts in the hand-writing of the deceased were drawn by him without assistance for the purpose of supplying Tatton when he wanted money. Not only are the drafts filled up by the deceased himself, but the sums are entered with the greatest accuracy at the other end of the check ; they are filled up in printed checks, thus, " John Harrison, (mentioning that they were for his brother's account), for William Tatton. 50*l*. 25th February, 1813." In the checks there is a particular accuracy, for though printed with the word " London," yet in every one the deceased scratches out London and inserts Bromley. Here is at the conclusion of them a still more singular piece of accuracy ; in all but the last they are signed "*Andrews Harri-*

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son, *for John Harrison ;*" but the last of them is not so drawn, but is signed, "*on the late John Harrison's account,*" varying the phrase. Now the fact is, that since the drawing of the preceding drafts Mr. John Harrison had died: this is a strong instance, if it comes from the deceased himself, not merely of memory and understanding, but of correct and minute attention and activity of faculties ; and yet it is stated by several of the witnesses, that about and soon after the death of Mr. John Harrison, the deceased was apparently even much worse than usual. It is certainly true that little incidental facts of this kind often weigh much more in the proof of capacity than the opinion of a great number of witnesses, such as Tatton, forming their opinions on such ground as he had for his ; it is indeed possible that Mr. Kinleside, or some other person, might be standing by, and might have dictated this and all the other drafts to the deceased, but of that there is no proof ; they are in the hand-writing of the deceased, and the instruments are exhibited ; but the Court will be better able to judge whether the deceased was capable of doing this without assistance when it comes to other parts of the evidence applying to circumstances of a similar sort.

The next witness to whom I shall refer is Browning, who is in the same situation in some degree as Tatton ; he was footman to Mr. John Harrison, from 1808 to the time of his death, and he gives his opinion of the incapacity of the deceased not quite so early or so uniformly as his fellow witness, Tatton ; for he states, that about the latter end of

1812, or the spring of 1813, the deceased's memory began to fail him ; he was subject to nervous complaints, which came upon him frequently, and upon those occasions he was altogether in a lost state, but independent of that complaint his memory had become impaired. The failure of memory became worse in 1813, and before the end of that year the deceased had become nearly, if not altogether, childish, and continued in that state till the month of March, 1814 ; he says that the deceased was not always in a state of forgetfulness, but there were times when he appeared sensible of what he was doing ; he believes he was, about September, 1812, capable of the management of his affairs ; that is a period which applies to the two first codicils ; that he has no reason to believe he was treated by those about him then as a childish person. From the time Mr. Benjamin Harrison came to live at Widmore, all orders were given by him, and after he removed, Mr. Kinleside was consulted, so that the deceased seldom gave any directions himself when he was competent to have so done. Before his brother's death, he used frequently to go about the house and garden at Shawfield, looking about him, and appeared not to know what he was about ; that he was roused by any one being with and talking to him, but when alone he drooped and lost himself very much ; the deponent never was about the house where the deceased lived, except to take a message, and he never stayed there any time : he then goes on and gives an instance of meeting the deceased in the spring of the year 1814, about half a mile from

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his own house, and the deceased not knowing him, but when he saw the witness in the evening he recollected him, and said, he wondered he did not know him when he met him, a circumstance to which the Court attaches very little importance, for it is, at most, only an instance of the deceased's not knowing a person, which, it is admitted, he was liable to, though it should seem rather, from what passed in the afternoon, as if this had been a mere accident. It also proves that the deceased did at this time walk half a mile from his house without being attended, and that he was not considered as in actual childishness, and under a total loss of his mental faculties.

The next witness is Curtis, who was coachman to Mr. John Harrison, and who is now an excise-man at Reading, and he says, "that he first observed the deceased's faculties to decay about twelve months before his brother's death; he was then growing very much lost; at times he was collected, at other times his memory was gone; about the middle of 1812 he grew worse; he does not know what could be the cause of his forgetfulness, except it were old age, as he believes it was; that about the time of his brother's death, the deceased appeared very much lost, and was frequently walking in a lonely way, and talking in such a simple whining manner, as shewed he was quite lost, and could not collect his thoughts; he was not always so, but very frequently, and almost constantly about that time; he frequently burst into tears and appeared full of care not taking notice of any one; the deponent has seen him undress himself in the

morning when he was sitting in his brother's house, and was very much agitated, all in a kind of tremble, and at such times altogether lost; this was owing, as the deponent believes, to a sort of fit, of a nervous kind, to which he was subject;" he mentions an instance in August, 1814, of the deceased's meeting him upon Widmore-green, just above Shawfield; the deponent made his obeisance to the deceased, and asked how he did, which he returned in a very polite manner, as though he had been a stranger, and a gentleman, evidently not knowing him. He says, upon the 17th interrogatory, "that the respondent, after the death of Mr. John Harrison, continued upon the premises, having very little to do till he was discharged by Mr. Kinleside, in May or June 1814; he afterwards lived with Mr. Olmius, and went to Reading in November 1815; he says that the respondent called on the deceased shortly before he went to Reading (that was in the latter end of 1815); he got Latter, the deceased's servant, to ask the deceased to lend him ten pounds, towards the expence of his moving to Reading; a few days afterwards Mr. Kinleside gave the respondent twenty pounds, as from the deceased; a day or two afterwards the respondent called to thank the deceased, Mr. Kinleside having told him that it was a gift from the deceased; the deceased told the respondent he was very welcome to it, and hoped it would do him good; the deceased seemed pretty well, and was then, as he believes, of a sound mind."—What then is the fair result of this man's deposition?—In chief he certainly deposes pretty strongly

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to his opinion of a fluctuating capacity at least, particularly about the time of the brother's death ; but here, so late as November 1815, this witness, by his own conduct, appears to have considered the deceased as in possession of his faculties, for he applies to him to borrow money, and he goes to return him thanks for the present which he has made. What does the deceased's conduct imply upon this occasion ? why to this old servant of his brother's, who it appears, on his own evidence, had been very attentive to his brother in his last illness, instead of lending him the money, he makes him a present of twenty pounds to place him in his new situation at Reading ; and when Curtis comes to return thanks for the gift, he recollects the transaction, tells him he is very welcome to it, and hopes it will do him good ; and, as Curtis admits, he was of sound mind, in November, 1815, which is a year and a half nearly after this testamentary instrument was executed.—The impression, therefore, of this deposition, taking the whole together, is rather favourable than adverse to general capacity.

The two next witnesses are Peebles and Hope, the gardener and under gardener, and they give an unfavourable opinion of the deceased's capacity, as far as their opportunities enabled them to judge of it, but they also assign partly the reasons upon which they found their opinion. Peebles says, that the faculties of the deceased began to decay about Christmas, 1812 ; the deceased at that time came into the garden, as he did every year, to distribute Christmas-boxes, and though he gave the de-

ponent his Christmas-box, he appeared to have forgotten who the deponent was, for he called him Curtis, which was the coachman's name, and asked him what fruit he was gathering; that at times, when walking about the garden, he remarked upon the weather being hot or cold, or something of that kind; that he saw and conversed with the deceased so little that he can hardly depose to his state of mind; he verily believes that in April, 1814, the deceased was not of sound or disposing mind, memory, or understanding, or capable of understanding the nature of his affairs or of his testamentary arrangements. Hope deposes much to the same effect, and says, upon the 11th article, he is quite certain the deceased was not, during any part of April 1814, of sound disposing mind, memory, or understanding.

Now these witnesses do not weigh very much with me, for where they rely on facts, the Court is enabled to judge for itself: the circumstance of his calling Peebles, Curtis, may have an effect upon an ignorant person, but no intelligent person will rely on such a circumstance; even the counsel gave it up, and thought it too trivial to argue, and without entering into an analysis of it—it is quite common to the most ordinary observer, it occurs every day; instances more striking than this have occurred to my observation during the progress of this cause: this is absence of mind, but absent persons have their memory as perfect as persons not liable to such blunders. As to asking him what fruit he was gathering, that might be a mere joke, of which it is proved he was fond, making an observation to

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the gardener, what fruit are you gathering? Taking the whole evidence together, it bears strongly in favour of memory and understanding, for he recollects the season of the year;—he goes to give the Christmas-boxes, he gives the usual amount, he pays them himself, and he enters them in his account book, because upon the very day after Christmas-day, December the 26th, 1812, are entered the sums which he paid to the different servants of John Harrison, and the sums which he paid to the different servants of Mrs. Jukes upon that day;—and, therefore, taking the whole of this evidence together, it as strongly marks capacity as those little instances which make an impression on the witnesses bear the other way.

Another witness, a gardener, Simmons, deposes to having met the deceased twice in 1814, in May and June, and twice in 1815, in July and August, and he says that the deceased did not know him, and that Mrs Jukes could not make him understand who he was. These occurrences are accounted for by the occasional attacks to which he was liable.

The only remaining witness of this class is Fuzzey, and the account which he gives of the deceased is this:—"he had lived as coachman with John Harrison for some years; he then became a farmer and corn-chandler in the neighbourhood, and he served the deceased with corn: he mentions that the deceased had a mare, that she took to kicking in the gig when Mr. Malin was driving her, and Mr. Malin had the misfortune to break his leg; the deceased had had the mare for some years, she was his riding mare as long as he was



able to ride ; after this accident he gave her to the deponent,—this was about the latter end of 1812.” That was after the time when they date the incapacity. Now, in respect to the mare, he says, upon the nineteenth interrogatory, mentioning the circumstances that passed on the occasion,—“ that the deceased said, that he would not keep, or use the mare any more, as she had kicked in the chaise. He asked the respondent what she was worth, who said fifteen pounds. He replied, she is not worth half that ; do you think she is worth a guinea ? The respondent laughed, and said Yes, Sir. The deceased then said, Do you give Curtis a guinea, and take away the mare.” Curtis speaks, upon the nineteenth interrogatory, much to the same effect, “ that when the deceased gave the mare to Fuzzey he was very jokey ;—he told Fuzzey he had rather he had the mare than any one else, and asked him what he could afford to give for her, if he thought she was worth seven pounds ; Fuzzey said, Yes, she was. Well then, said the deceased, give Curtis a guinea, and take away the mare ;—he remembers the deceased saying that he did not mind the mare being worked at the farm, but he could not let her go to posting work, as she had been a good mare, and he liked her.” Now, this is the latter end, as I stated, of 1812, and it proves any thing but incapacity ;—here is mind and memory, and a knowledge of human nature ;—here is a favourite old riding mare ;—he will not keep her because she has done mischief ;—he will not sell her to posting, he will not sell her to Fuzzey, as he might think himself at liberty to sell her again, or expose her

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to ill usage, but he gives her to the old coachman to be used on the farm, only requiring him to give a fee of a guinea to Curtis ; and he is very jocose upon the occasion : certainly this does not shew any loss of faculties. But Fuzzey goes on and says, “ that about nine months afterwards he took the mare to Shawfield with some corn, and that the deceased acted in a very strange manner :—he says that he was not then paid as he commonly was ;” here then was an instance of the deceased’s incapacity at that time ;—he says, “ that he went about three weeks afterwards to be paid ;—the deceased did not appear to take such notice of him as usual ;—when the deceased did understand, he went and fetched the money in bank notes, which he counted over twice, and then gave the deponent one note too much ;” and he enters into some particular conversation as to that head, as an instance of more doubtful capacity ;—that at first he did not know Fuzzey ; when he did he went and fetched the money, and paid him a pound too much. That might happen from accident, or from a want of mind ;—it shews a fluctuating state of mind. He says, “ that sometimes the deceased appeared to have his recollection about him a good deal better than at other times, for he very well remembers that the deceased has more than once written a receipt for him to sign, and he has written it very correctly, and the deceased seemed to recognize him when he came, and then again at other times there was no making him understand who he was, or what he came for ; it was about the time of his brother’s death that the deponent particularly ob-

served that the deceased's memory failed him." But surely no intelligent person, who has been a careful observer of life, and I am sure no person who has been accustomed to proceedings in this Court, will be at a loss to account for these fluctuations in an old man, that sometimes he is intelligent, and sometimes not;—more especially where he is liable to special and particular attacks. He says, "that he remembers that the deceased appeared worse about, and for some time, perhaps nine or ten months after, his brother's death; the deponent remembers that once or twice during that time, Mr. Kinleside paid the deponent, saying, that the governor was very poorly;—and after that, the two last times that ever the deceased had corn, he paid the deponent himself by draft on his bankers, which he wrote himself, for his eye-sight was very good, and he wrote a clear strong hand, but some one, generally Mr. Kinleside, looked over the bill and draft to see that all was correct." He throws in here that Mr. Kinleside or some one stood by to see that all was correct, but he does not attempt to say that Mr. Kinleside interposed, or that there was any necessity for the deceased's receiving assistance; that all was not done by the deceased himself, certainly, without any assistance. Here then comes out from this very witness, direct proof that the deceased could conduct transactions of business correctly; that he could receive his bills for corn; that he could pay them by drafts upon his bankers, which he wrote himself; and that he went through the whole of the business correctly, without assistance. This witness is confirmed in

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this respect by others, though being produced in opposition to capacity, confirmation might not be necessary, but he is confirmed by a fellow-servant, Alexander, and also by the Rev. Mr. Walmesley, both of whom were present when some of these payments were made to Fuzzey. He is also confirmed by the draughts on the bankers, for here they are all filled up by the deceased, and here is the counter entry by the deceased in his own handwriting; here are Fuzzey's bills and receipts, endorsed by the deceased himself, docketted on the back with the name of the person to whom paid, when paid, and the amount of the bill. They occur in January, March, June, and October, 1813, and February, May, and subsequent months in 1814, and therefore they occur at the periods most important to examine into as to the capacity of the deceased; here are also corresponding entries of the several payments made to Fuzzey in the deceased's own private book of accounts of his cash and expenditure, and the result therefore, of this evidence, in my judgment, proves a case quite different from that which was intended to be set up.

The next class of witnesses are three of the deceased's friends, who made occasional visits to him. The first of these is Mr. Matthew Harrison, the brother of the party in the cause, and he states in his deposition that he was acquainted with the deceased from his childhood, and he visited him on the 5th day of December, 1813; that he had seen him three or four times in the preceding twelve months; that on the 5th of December the deceased did not know him, and Mrs. Jukes was under the

necessity of addressing the deceased, which she did, nearly in the following terms,—“ Governor, don’t you know that this is Mr. Matthew Harrison, and don’t you know that he has a wife and children, and don’t you ask after his wife and children?” and that the deceased muttered something which the deponent did not distinctly hear, but which he understood to be, “ I hope they are well,” or to that effect: he said that Mrs. Jukes, again addressing the deceased, said, “ I am sure you will be glad to hear that Mr. and Mrs. Ben Harrison and all the children are well at Guy’s,” upon which the deceased replied,—“ I am glad to hear it,” in a muttering tone; the deponent staid with him about half an hour, but did not attempt to enter into conversation with the deceased;—he was not in a state of mind to converse on any subject;—that after the deponent’s name had been mentioned, the deceased could not distinguish him from any other person, and did not, during the visit, recognise him as he had formerly done, and he well remembers, that during one half the visit he was in a sleeping state. Then he says, that he has not the least doubt that the deceased was of unsound mind, memory, and understanding, and that he was incapable, at that time, of making his will, or of doing any other act of a testamentary nature, or any act whatever requiring thought, judgment, and reflection; and I have no doubt this is Mr. Matthew Harrison’s sincere opinion, and possibly it might be a correct opinion, that the deceased was not, during this half hour, capable of doing any act requiring thought, judgment, and reflection, because unques-

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tionably he was sometimes in a state of incapacity. —It has, however, been pointed out to the notice of the Court, that upon this very 5th of December, the deceased writes a very rational and proper answer to a letter which he had received from Mr. Boodle ;—the letter is exhibited :—“ *Widmore, 5th of Dec. 1813, Dear Sir, the day you have fixed to be here with Mr. Stanley will be most convenient to me, and I hope Mr. Kinleside will be able to settle for the probate of the will. I remain, dear Sir, your's, sincerely, Andrews Harrison.*” It is addressed to “Edward Boodle, Esq. Brook-street, London,” and it is fairly written and properly addressed, and certainly, in this letter, there is no mark whatever of unsound understanding, or of want of thought and recollection, or of loss of memory ; and when the Court recollects the object of this letter was to make an appointment with Mr. Boodle, for the purpose of making an alteration in the deceased's will, to the exclusion of Mr. Matthew Harrison's brother, the suggestion made by the counsel does not seem very improbable, that the deceased did feel unwilling to enter into familiar conversation with Mr. Matthew Harrison on this day, and that he would turn rather a deaf ear to this suggestion of Mrs. Jukes's, of enquiring after Mrs. Harrison and the children at Guy's, for he was a sincere moral man, and at the very time when he proposed utterly to exclude Mr. Benjamin Harrison from his testamentary bounty, he would not enter into conversation with the brother, or make inquiries after him. The other observation made by the counsel is still less matter of con-  
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ture ; it is a matter of necessary inference : Mr. Matthew Harrison had seen the deceased three or four times during the preceding twelve months ;— now, when he only deposes to incapacity on the 5th of December, 1813, and he is specifically called on for that purpose, I think it is a just inference, that upon the other occasions when he saw the deceased in that year, he did not observe any symptoms of incapacity. The excuse offered in answer is, that being the brother of the party, they did not choose to produce Mr. Matthew Harrison to the general incapacity ;—that might be something of a reason for not producing him at all ; and in the allegation there does appear to be something of an unwillingness to vouch him by name, because in that article they do not plead it was Matthew Harrison who visited the deceased on the 5th day of December, but an old and intimate friend of the deceased : but, why, having produced him to incapacity on this day, and he having had other opportunities of seeing the deceased in 1812 and 1813, they should not have examined him to incapacity at the former periods in 1813, can be accounted for only by this, that he could not, with truth, depose that he did observe any symptom of incapacity. Taking his evidence, however, at the utmost, he only speaks to incapacity on this particular day during half an hour.

Mr. Gordon, another friend, who, I presume, was the deceased's successor in business, together with Mr. Stanley, is the next witness ; his evidence goes no further than this ; he says, " he used to

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visit the deceased once a year ;—his last visit was in June, 1813 ;—his memory had evidently become weakened from his great age, and, as the deponent believed, from a decay in nature, in the year 1812,” which he afterwards corrects to 1813. The deponent introduced the subject of Mr. Benjamin Harrison having left Widmore, and that the deceased appeared very indifferent about it ; he says, that in June, 1813, the decay of his memory and faculties had evidently increased, his mind wandered, he appeared lost at times in conversation : the deponent was with him seven or eight hours, and had a fair opportunity of observing his state ; he does not remember any particular instances from which he made such observations respecting the deceased’s faculties and memory, except as to his not being able to comprehend who some persons were of whom the deponent and Mrs. Jukes were talking.” He says, upon the 5th interrogatory, that the deceased was for many years subject to nervous attacks ; that he saw the deceased once in 1812, and once in 1813. Upon the 10th interrogatory, he says he does entertain considerable doubt of the deceased’s being capable of the management of his affairs in 1813. He says, upon the 2nd interrogatory, “ that meeting Mr. Matthew Harrison, soon after the deceased’s death, he expressed a hope that his brother, the producent, was benefited by deceased’s will, who replied, no,—that a codicil had been made, whereby what was left to him had been taken away. The respondent said, he feared there had been some iniquitous proceed-



ing, for he knew well what a regard the deceased and his brother had for the producent, and said, if his evidence was of use, he was welcome to call for it." He says, upon the 26th interrogatory, "he never heard any thing upon the subject of the deceased being displeased with the producent, except that there was a coolness between them, and that Mr. Kinleside was at the bottom of it, and had made some representations to the deceased to the prejudice of the producent."—Now, this gentleman ventures not only to indulge a suspicion of "*iniquitous proceedings*," but to suggest this suspicion to Mr. Matthew Harrison, the brother of Mr. Benjamin Harrison, upon no better grounds than the deceased's great regard for Mr. Benjamin Harrison; and yet this witness admits himself that he introduced Mr. Benjamin Harrison's name in conversation to the deceased, and that he appeared rather indifferent about it; he admits a coolness between the deceased and Mr. Benjamin Harrison; and he admits that he did not know that Mr. Benjamin Harrison had ever called upon the deceased after the month of June, 1812. I have not the least suspicion that Mr. Gordon has given any thing more than his sincere opinion; but when a witness volunteers his evidence under prepossessions taken up on such foundations as these, the Court cannot give any very great weight to the force and effect of his mere opinion as to the state of the deceased.

Mr. Stanley had more opportunities of observing the deceased, and his is material evidence. He states that he had known the deceased from his

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childhood ; his father was in partnership with him ; he visited him " in the month of September, 1812 ; he remembers being at Widmore a few days after the codicil of the 2d of September was executed, and that he dined with the deceased and his brother ; that in the course of the evening the deceased shewed a want of recollection, and apparently a partial decay of his mental faculties, particularly of his memory, which at intervals he appeared to have lost :—several instances of it occurred in the course of the evening ; in one instance he asked the witness how old his father was, though he had been dead sixteen years ; another time he asked him about himself, inquiring how Mr. Stanley was, evidently forgetting the deponent, who sat next to him. On being corrected by the deponent the deceased's recollection returned, and he said, ' Oh, ah, to be sure,' just as if he had awoke from a dream. He says that he was not with the deceased sufficiently often to enable him to form a correct opinion as to whether the deceased was or was not, generally capable of comprehending the state of his affairs ; but he did observe, generally, from his manner, conduct, and conversation, that he was a good deal broken, and that his mind was going. The deponent did not see him again till after the death of his brother, when he went to Widmore to be present at the opening of the will, and to attend the funeral, and he saw the deceased three or four different days about that time ; he does not remember particular instances of decay of faculties, or loss of memory, except as he is about to depose

in answer to the next article ; and yet he says, the deceased appeared to him to be much in the same state as he was before ;—he was again with the deceased on the days of which he will more particularly depose, at which times the deceased was evidently worse. Those particular transactions it will be necessary for the Court to examine presently. He says, “ that he was again with the deceased in September 1814, when the deceased did not know him ; but, after Mrs. Jukes had explained who he was, by saying “ Governor, don’t you know your old friend, Mr. Stanley ?” the deceased said, “ Oh dear, is that Mr. Stanley ? oh, yes, certainly I do,” and the deceased did then appear to recognize him. He says, on the 5th interrogatory, that on one of the days to which he has deposed on his examination in chief, he remembers being present with the deceased, dining with him, when he was attacked with a sort of fit, which lasted only a few minutes ;—he revived quickly, and he concludes with saying, “ that he last saw him in September 1815 ; that he was then no better ;—he believes the deceased was not, from September, 1812, capable of comprehending the state of his affairs, or of managing the same.” Now these terms, *capable of comprehending the state of his affairs, or of managing the same*, are still more wide and vague, and still afford a looser standard of capacity even than the usual terms which are made use of : they may stand at very wide distances indeed, but he does not, at the utmost, go beyond a fluctuating, doubtful capacity, and his conduct shews he did not conceive the de-

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ceased reduced to utter childishness and incapacity ; he says, on a further interrogatory, the 34th, " that the deceased was a co-executor with the respondent of his late brother, Mr. John Harrison. Mr. Boodle did attend the deceased at Widmore, in December 1813, when he was sworn to his brother's will ; the respondent does not recollect that Mr. Boodle did express any doubts of the deceased's capacity ; the respondent and the deceased did meet some time in January 1814, for the purpose of discharging several of the legacies bequeathed by his brother's will, and for the payment of some tradesmen's bills ; the deceased did sign several drafts on the bankers for paying off those demands ; he did all that he had to do correctly, which was merely to sign his name ;—he could do any thing of that kind very well ;—he could do what he was told to do, but he was not, as the respondent believes, of sound mind." It is a little extraordinary that he should transact all this business with a person who he thinks was not of sound mind ; but the deceased shews no want of accuracy ;—every thing he does, he does correctly and properly, without observation, without assistance ;—he signs twenty drafts at least upon that morning, with Mr. Stanley, for the payment of the debts of his brother ; and he does not merely sign his name, but it is "*Andrews Harrison, executor to John Harrison,*" that is the way in which every one of these drafts is signed ;—he does not forget himself and not know what he is about, and Mr. Stanley does not suggest it was necessary to instruct him how he was to sign his name, and this

is done twenty times together. Mr. Stanley, however, is of opinion, but it is mere opinion, that he could not do any thing more, and that he was still of unsound mind, possibly founding that opinion on some circumstances which happened afterwards in December and March, which I shall presently notice. Mr. Stanley settled his executorship accounts with the deceased, for in page 71 of the book, I find this entry, "September the 28th, 1814. To cash of Stanley, £267. 10s. 2d November, 1814. To balance of account of executors of J. H. £224. 9s." So that these sums must have been paid over to the deceased, and he regularly enters them in his book of accounts. Mr. Stanley again visits the deceased in September 1815, and all he says then is, that he was no worse. On the death of the deceased, he is sworn as one of his executors by error, and was going to take probate of these codicils; nay, he becomes a party in this cause, and makes an affidavit as to scripts, and annexes these codicils as a part of the true will of the deceased. The counsel say, as an apology, that he was incautious in this respect; now, really, the Court cannot impute to him incaution, or that he had so slight a regard to the solemnity of an oath. I rather think he was sincere on both occasions, and that he swore to what he thought was true at the time of applying for probate, and at the time of the affidavit;—he had no idea at these times that the deceased was in such a state of incapacity as that instruments attested by respectable witnesses, were not the legal acts of the deceased. It is true,

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different impressions have arisen since in his mind, not perhaps confining himself to his own recollection of the facts within his knowledge, but by allowing his mind, as human infirmity is apt to do, to have an impression made on it by what he is told by others.

The three remaining witnesses are the three maid-servants of Mrs. Jukes, residing constantly in the same house with the deceased; those witnesses, therefore, had very good opportunities of judging of the capacity of the deceased, as far as such persons are capable of judging correctly; more especially Alexander, who was Mrs. Jukes's lady's maid; and the counsel on both sides have relied on her evidence, as having been fairly given. She is produced by Mr. Benjamin Harrison, and there is no particular reason to believe that she is biassed in favour of Mr. Kinleside; indeed, I am to recollect, that Mr. Kinleside's situation having been such that his duty called on him to settle the accounts of Mr. John Harrison, and being his residuary legatee, having an interest to look accurately into those accounts, and other business of this sort, it is not difficult to account for his not being very popular in those two mansions among this class of persons; but Alexander appears to have given her evidence with great fairness. Her account deserves to be stated with some particularity;—she says, “she has lived with Mrs. Jukes twenty-three years; that for five or six years before his death, the deceased was subject to a kind of fit, though of what particular description it was, or

what it should properly be called, she does not know ;—when so attacked, the deceased would turn pale, and tremble very much ;—he was apparently giddy, and at times quite insensible ;—now and then, for some days after being so attacked, he did not know what he was about, but at all times, when free from these attacks, he had his recollection about him, and was quite rational and sensible ;—how frequently these fits came upon him she cannot recollect, but the attacks were more frequent about the time of his brother's death ; she says, that if any thing worried or agitated him, he was more liable than at other times ;—sometimes he had not a fit for several weeks together, at others more frequently, up to the last year of his life, when they increased upon him ; he was worse about the time of his brother's death, and a good deal less collected than before or after ; she says, that the deceased at times lost the recollection of his friends and acquaintance, which was not owing to his loss of eye-sight, for within a month of his death he read a newspaper quite distinctly, and without difficulty, aloud, and without spectacles ;—she says, that sometimes she has thought that the deceased pretended not to know, and would not recollect people when he really did know them, she is fully persuaded that such was the case ; at other times he certainly did not know them ;—that the deceased did commonly pay what few bills he had himself, they were only for hay and corn, and such like ;—he kept his money up stairs, and when she took the bills to him, he used to exa-

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mine them to see that they were right, and then went and fetched the money and paid the people himself ;—the last bill he paid, which was Fuzzey's for corn, the deponent remembers his saying, he did not think he had money enough ; Mrs. Jukes offered to lend him some ; the deceased said no, he would go and see what he had, and finding he had enough, he came into the kitchen and paid Fuzzey. This was a few months before he died ;—she believes, that excepting the particular times she has deposed to, the deceased never was entirely incapable, and then he would not be himself again for sometimes three or four days afterwards, at others he got over them much sooner." She mentions another particular instance, "that she remembers within six months of his death, when she took her book of house-expenses to her mistress to settle with her, as she did once a week, and Mrs. Jukes had cast it up herself, she gave it to the deceased to cast for her, and he did so, and pointed out to the deponent a mistake she had made, and jokingly said she wanted to cheat her mistress ;—that though at times he was quite lost, yet his faculties had not failed him for a continuance." She also negatives the circumstance of his having lost his sense of delicacy and decency ;—she explains the reason of a person being put to sleep in his room ; which fact, however, of a person being put to sleep in his room, did not happen till a great many months after these codicils were made. These are a few of the passages of this witness's deposition, and they sufficiently shew the general



tenor of it. She is confirmed by the other female servants, Brown, the cook, and Stilwell, the house-keeper, who though they had not the same opportunity of judging of the deceased's capacity as the last witness, yet, as far as they had, they describe his capacity like Alexander ; and that, except when under the influence of these fits, he was in the full possession of his capacity.

These are all the witnesses produced by Mr. Benjamin Harrison ;—but there is one other witness who must not be passed over, William Taylor ;—he was footman to Mrs. Jukes, and he had as good opportunities of judging as his fellow witnesses, Mrs. Alexander, and Brown, and Stilwell, but he gives a very different account of the state and condition of the deceased ; it is stated in his evidence upon interrogatories, “ he was footman to Mrs. Jukes from September, 1811, to August, 1815 ;—he now keeps a public-house at Wherwell ; he says the deceased lived in the same house with Mrs. Jukes, during the whole time he was in her service ;” he says upon the 2nd interrogatory, “ that early in the summer of 1812, he observed an alteration in the state of the deceased's mind and memory ; it was about the time that Mr. Malin's difficulties occurred, which affected him very much, and he appeared to lose his memory, and his intellects grew weak ;—that he was entirely incapable of recollecting those people who came to the house, unless told who they were ;—that the deceased was incapable of understanding what passed ;—that he required to be reminded what was to be done ;—that he was quite forgetful and

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childish ;—the deceased did not know what he was doing when he signed the codicil of 31st August and 2d September, 1812 ; the respondent put his name as a witness to those codicils, because he was desired to do so ; that long before the brother's death, his memory failed him so that he could not play at cards, he thinks it was about the time of making the codicils ;"—he goes on to state, upon the eleventh interrogatory, " that the deceased, for nearly two years prior to April, 1814, which is the date of the last codicil, was incapable of giving directions to the servants of the family, and that the deceased was, from that time down to the time when the respondent quitted Mrs. Jukes's service, treated as a person who had become quite childish and incapable of the management of his affairs ;"—upon the twelfth interrogatory he deposes, " that it was necessary, for the last three years, for Mrs. Jukes or some one to inform the deceased, who the different persons were who called, it was always done." These are some passages of his cross-examination ;—they are sufficient to shew that he deposes to a state of entire childishness, quite up to Mr. Harrison's plea ;—this is certainly strong evidence, if it could be safely relied upon. The witness Alexander, upon her first interrogatory, says,—“ that the first person that said any thing to her about being examined, was William Taylor ;—that he came down to Widmore soon after the deceased was dead ;—that he soon after came down again ;—that the respondent found he had been with Mr. Benjamin Harrison ;—that he asked her a great many questions : the respond-

ent said she could not remember many things that he spoke of, and he told her her memory was very bad; he said a great deal about the deceased's faculties, and about the deceased's behaviour." Here then we find this witness, immediately upon the death of the testator, quite active;—he goes down to Widmore, he then goes to Mr. Benjamin Harrison;—he goes down to Widmore again;—he has a good deal of conversation with this material witness about the deceased, and about his faculties, and because Mrs. Alexander cannot recollect such facts as he thinks proper to suggest, he charges her with her memory being very bad;—it must have had a tendency at least, whatever the intention might have been, of exciting and tutoring this witness; his account of the state of the deceased is quite irreconcilable with the account of Mrs. Alexander, and those to whom the Court has adverted, and the Court must soon advert to others; he has not the same apology as the gardener and others who saw him only occasionally; this witness was constantly in the house with him; acceding as I do to many of the observations made on his testimony by the counsel for Mr. Kinleside, I would further observe that though he is produced by Mr. Kinleside, he is rather, I think, in this part of his evidence, to be considered as the witness of Mr. Benjamin Harrison, Mr. Kinleside was under the necessity of producing him as an attesting witness to these codicils; he is only produced to the factum of these codicils, the factum of which, though he attested them, he has thought proper to deny; he is not only interrogated to the factum of these codicils, but he is

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interrogated to the whole case intended to be set up afterwards by Mr. Benjamin Harrison, and from his early communication with the party,—from the tenor of the interrogatories,—from the allegation which was afterwards given in,—(to parts of which no other witness than this witness has attempted to depose ;)—I am led to infer, that the principal grounds of opposition to this case are founded upon information conveyed by this witness to Mr. Harrison, who we find so very active immediately after the death of the testator, and when these facts are deposed to, by being brought out upon leading interrogatories addressed to him, it being known beforehand what the witness could say, and those interrogatories not addressed to him for the purpose of extracting evidence from him which the party was unacquainted with, he is to be considered, I think, as Mr. Benjamin Harrison's witness, but without the adverse party having had the advantage of his being produced to those facts on Mr. Benjamin Harrison's allegation, and therefore he is a witness whom there was no opportunity of cross-examining, and in that point of view the Court is bound, I think, to make very considerable deduction from the evidence he has given, and when his description of the general state of the deceased is inconsistent with the other witnesses, who had the same opportunities of seeing the deceased, when it is at variance with Mr. Boodle himself as to the capacity upon the execution of this codicil, and upon some other parts of Mr. Boodle's evidence, and when he is directly at issue with some other respectable wit-

nesses in the cause, he is a witness on whom the Court cannot rely; whether his evidence has arisen from some prepossession or bias in his mind, or some defect of intellect, or from whatever cause, without imputing to him an intention of really per-juring himself, I am not going too far in saying I cannot rely on any fact stated by him, where he is not corroborated by some other evidence.

There are several circumstances pleaded as inferring incapacity, which are either wholly disproved, or so explained as to change their character;—his losing his delicacy,—his getting up in the night,—and his undressing himself in the day;—but there are circumstances pleaded in the tenth article of the allegation, which it becomes my duty to examine, because it is certainly a very important part of the case, and that is, as to three interviews, which were had with the deceased by Mr. Boodle and two other persons, in the month of December, 1813, and one in March, 1814, upon which occasion the deceased was judged by all the persons present to be in a state unfit to proceed to a testamentary act:—the account given by Mr. Boodle of these meetings is to this effect;—upon the fifth and subsequent interrogatories, that, “On the 7th of December he went to Widmore, to the deceased’s house, accompanied by Mr. Stanley;—they there met Mr. Wells and Mrs. Jukes;—the respondent had determined to proceed cautiously, in consequence of a certain degree of want of recollection, which he thought he had observed in the deceased upon one or more of the occasions on which he had seen him shortly before,

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on the subject of his late brother's affairs." Mr. Boodle had been several times with the deceased, just at the time of his brother's death, when it is admitted he was in a worse state than usual, but the utmost Mr. Boodle says here is, that he thought he had observed a certain degree of want of recollection in the deceased upon one or more of the occasions on which he had seen him ; he says, " that after explaining to those present, the course he intended to pursue in taking the deceased's instructions for some intended alterations in his will, the deponent took down from him, in the presence of Mr. Wells and Mr. Stanley, the testator's own ideas of the property which he possessed, the dispositions he had made of it by his will and codicils as they then stood, and the alterations which he wished to make, but it being apparent to them all three that the deceased's mind and memory were by no means in such a state as to enable him to make a clear and consistent disposition of his property, it was agreed by all, that it would be proper to postpone the business, and an appointment was made for the following Tuesday. At this meeting the deceased certainly gave such evident proofs of a want of recollection, that the respondent had no doubt of his being in a state unfit to make any alteration in the existing testamentary disposition of his property," he says, " that he was with the deceased upon the occasion now deposed of, not less than two hours ;" here it is obvious that Mr. Boodle considered that the whole of the will and codicils was to be revised, that alterations were to be made in every part of them, and the deceased

is left to find his way through them, and propose his alterations as he can. This might be quite proper and cautious; I am merely noticing the fact. He says, "that on the 10th of December Mr. Kinleside called upon him at his house in Brook-street, and said, that now finding by a comparison of Mr. Andrews and Mr. John Harrison's wills, that they had been made in perfect unison, and with a mutual understanding between themselves, he thought that no alteration could properly take place, the respondent told him plainly, that was his opinion too; but it must be what Mr. Andrews Harrison himself should determine." Here Mr. Boodle's own opinion plainly is, that no alterations ought to be made in the will, but certainly he is not impressed with the permanency of the incapacity of Mr. Andrews Harrison at this time, for he says, that it must be what Mr. Andrews Harrison himself should determine.

Mr. Stanley states, upon the 32d interrogatory, that "Mr. Boodle did express to the respondent on his return home, that he felt himself peculiarly situated, with reference to the deceased, knowing, as he did, that the wills of the two brothers had been made by them with a distinct understanding that no alteration should be made by the survivor, upon which point the deceased and his brother had been very anxious for many years; and the circumstance of the deceased's wishing, immediately after his brother's death, to make such alterations, excited in his mind a suspicion of the deceased's capacity, and of the possible influence of those about the deceased, and that he had therefore felt

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himself called upon to be very cautious in the steps which he took."—This is the account which Mr. Stanley gives of the conversation between himself and Mr. Boodle ; but I think this is manifestly stated more strongly than Mr. Boodle himself meant to state it, or than he has stated it in his deposition in several respects, but more particularly in respect to this distinct understanding between the brothers, that no alteration should be made by the survivor, it only shews how cautious the Court should be upon all occasions in receiving evidence of mere declarations passing in conversation, which are so easily misapprehended, and which are so very liable, unintentionally, to be exaggerated and distorted from their true bearings ; for Mr. Boodle, on the third interrogatory, thus states himself, " he does not remember any desire being expressed by both, of carrying each other's wishes into effect ; though it might be implied by their giving instructions jointly, as they did, and certainly a strong inclination was manifest in each to satisfy the other ; he does not remember any wish being expressed, that the ultimate arrangements existing at the death of either, should not be varied by the survivor : " surely then the inference drawn from their giving instructions together, and these affectionate brothers feeling a strong inclination to make their dispositions satisfactory to each other, is something far short of what Mr. Stanley apprehended, namely, that there was a distinct understanding between them, that the survivor should not make any alterations whatever ; Mr. Boodle never so understood it, for he makes two altera-



tions in the life-time of the brother, and when the brother did not make corresponding alterations, and they were *pro tanto* alterations when the brother was in a state of incapacity, and he makes two others when the brother was in a state not competent to do any testamentary act; but still it is quite clear Mr. Boodle goes down with an impression that no alteration ought to be made: and with an impression that the deceased's capacity might be in a doubtful state, and that there might be some influence exercised by those about the deceased. He says, "he went again to the deceased's house on the 14th of December with Mr. Stanley, and he read over with Mr. Andrews Harrison, the whole of his existing will of 1808, and the several codicils thereto, taking down the deceased's own ideas of the alterations he was to make; and the various instances of want of memory which occurred in the course of taking them down, proved to their mutual conviction, that, although much better in that respect than at their last meeting, he was still unfit to make any consistent disposition of his property. He states further, that on the 19th of March following, he received a letter from the deceased, desiring him to come to Widmore on the following Monday, for the purpose of making a codicil to his will; the respondent wrote to the deceased, that he proposed attending him; circumstances preventing his going there upon the Monday, (both the letters are exhibited in this case) he went there on Tuesday the 22d of March, and endeavoured again to take instructions from the deceased, for

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the proposed alterations in his will, taking down a list of names of legatees under his existing will, specifying such as the deceased conceived to be dead, and afterwards endeavouring to learn from him, what legacies he then meant to leave; but after two hours' close attention to all he said, and taking down his intentions as far as they could be at all made out, his instructions were so incoherent and so inconsistent with his former deliberate and well considered intentions, that not only Mr. Stanley and the respondent, but even Mrs. Jukes, who had shewn great anxiety to have some of his intentions carried into effect, agreed that he was by no means in a state of mind, memory, or understanding, competent to make any new disposition of his property; the respondent therefore returned to London, under an engagement to come again to Widmore whenever Mrs. Jukes should find him to be in a disposing state of mind and intellect; he states further, "that he remembers, that on the second visit Mr. Wells did express an opinion that it was unnecessary to go through the will as it confused the deceased; and he wished to confine the deceased more immediately to the devise of the real estate; to which suggestion the respondent did not feel himself at liberty to agree: upon the last of the three interviews of which he has herein deposed, the deceased had his existing will before him, which he read himself, making his own remarks on each particular legacy and appointment as he proceeded; the observations which he so made being taken down in writing by the respondent." Upon the tenth interrogatory he says "the

deceased was composed, he shewed no irritation, except that whenever the name of Mr. Benjamin Harrison was mentioned or occurred, he spoke with more quickness than belonged to him." To the 11th interrogatory he says, "that from the observation he made, he considered, and still does consider, that it was not so much a decay of understanding as of memory which the deceased manifested; he says "that the deceased was quite rational, but where memory was concerned very deficient. The respondent cannot take upon himself to say the deceased was permanently incapable." Upon the 12th interrogatory he says "it was apparent to him, that the deceased's mind was upon all three occasions of which he has deposed, strongly impressed with a feeling against Mr. Benjamin Harrison, and he shewed a great anxiety to make alterations of those bequests which related to him, in some degree also towards Mr. Paul Malin; when the respondent was with the deceased in 1812, the deceased expressed great concern at Mr. Benjamin Harrison having declined to be his executor; but he did not then shew any such feeling of irritation as existed subsequently, and how that had arisen the respondent does not know."

At present I am only considering how this evidence bears on the question of capacity: how it is to bear either on volition, or on fraud, or circumvention, belongs to another part of the case:—Mr. Boodle goes down with strong prepossessions against any alterations being made, and with unfavourable impressions in other respects as to

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the state of the deceased: on the two first occasions he thought the deceased wished to make an entire new will, and the deceased attempted to go through the whole of this long and complicated disposition contained in his will and codicils: on the third interview also, though the deceased had mentioned in his note, which is not exhibited, "I wish to make a codicil," yet the same course is still pursued of going through the whole of the testamentary dispositions; the deceased becomes confused, and though, as Mr. Boodle says, he was quite rational, yet he shewed strong marks of want of memory; and, therefore, Mr. Boodle declined proceeding. He and Mr. Wells differ in their opinion in respect to the course which ought to have taken place on this occasion; the Court is not called on to decide that point between them: in Mr. Boodle's view of the subject, and as things appeared to him, knowing only so much as he did of the state of mind of the deceased, the course he pursued might be quite correct; at all events his conduct was perfectly cautious; and, without doubt, was highly honourable. The Court is only considering how these transactions ought to bear out the general capacity of the deceased, and really, under such circumstances as have occurred, the deceased becoming confused, and shewing marks of defective recollection, a person of his great age, subject to nervous fits, which were liable to be brought on while his mind was anxious and agitated, these transactions, though they are extremely important in considering a question of general capacity, are, in my judgment, by no means con-

clusive; at other times, and under different circumstances, and the deceased attempting a less extensive arrangement, he might not be confused, but might recollect all circumstances connected with, and necessary to give effect to testamentary acts of a less complex sort; for, as Mr. Boodle observes, his understanding was not defective; he is quite rational, it is only defect of recollection that is imputed to him, and Mr. Boodle does not venture to say he was impressed with an idea of his being permanently incapable; on the contrary, at the last interview he proposes attending again if it should be necessary.

It is proper now to compare this with the other evidence, to see whether at these interviews the deceased was in his general and ordinary state, or whether he was seen under circumstances of disadvantage and confusion, and defective recollection, which did not exist at other times: for this purpose it may be right now to advert to some of the evidence produced by Mr. Kinleside in support of the general capacity; for hitherto the Court has only examined the evidence produced by Mr. Benjamin Harrison in support of his case.

Mrs. Jukes, the old lady in whose house the deceased lived for so many years, has been examined; she had undoubtedly the very best opportunities of observing the state of the deceased's mind, being constantly in his society; at the same time she is very old, she is eighty years of age at the time of the examination, and is certainly subject to some lapses of memory: she has undergone one of the longest examinations ever taken in this Court, first

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on a very long allegation, and then on upwards of forty interrogatories : but I see no reason to suppose she does not relate what she recollects truly and with integrity, and her account is this :—" she was acquainted with the deceased for nearly sixty years ; he came to reside with her about the year 1789, and continued to reside with her till his death ; for several years before his death, he was subject to a nervous attack, which was sometimes like a fit : she remembers that the deceased was first attacked with the nervous complaint, of which she is now deposing, several years before his death, in a slight degree, they then lasted only for a little while ; their effect was to confuse him, and he did not know where he was or what he was about ; sometimes they would go off in a little while, at other times the nervous affection would continue upon him for some days : as he advanced in years the attacks came on more violently, and assumed a different appearance, being more like fits, but they were uncertain both as to their recurrence and duration ; if any thing happened to agitate him, it would bring on the nervous attack, but generally they came on without previous notice or warning. Within the last two years, the last of all more particularly, the attacks were more violent, and more frequent too, than they had been before, but she thinks, that when they became more violent they were sooner over ; that at all times during 1812, 1813, and 1814, and almost to the very time of his death, the deceased retained his mental faculties, and excepting those times when he was suffering under the attacks

to which she has deposed, or the effects of such attacks, he was of perfectly sound mind and understanding ; his memory was so far affected by the repeated nervous attacks, that he did not remember persons whom he was not accustomed to see, till he was told who they were ; otherwise his knowledge and recollection of persons, particularly those about him, were good ; he was so deaf, that the deponent's voice being weak, she could not converse much with him, but whenever he did join in conversation, he conversed very rationally and sensibly, and with great good humour, for he was a very sensible man, and remarkably cheerful, though very calm. It was his constant habit to read to her the psalms of the day, and lessons, unless prevented by visitors or illness ; now and then he was fond of a little fun ; if he came to any passage that reflected upon women, he would be humorous upon it ; he was capable of comprehending the state of his affairs, and fully capable of managing them to the last, always paying his own bills, and regularly entering in his account book all the payments he made ; but he did this principally in his own room, though he made no secret about any thing ; the deceased used to assist the deponent in keeping her accounts, in which he now and then discovered a mistake, and that he was always capable, except when under the influence of his nervous complaint, of settling any accounts whatever without assistance, or of doing any act requiring thought, judgment, and reflection ; that neither she herself, nor any other person, thought of treating him otherwise than as a

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person who was very capable; he would have been offended, and properly so, if they had done otherwise." This is the substance of the old lady's account;—and it very much corresponds with the account of the maid-servant Alexander; and is confirmed by other respectable witnesses.

The next person to whom I shall advert, who is considered on both sides an important witness, is a medical attendant and friend of the deceased, Mr. Roberts; he states "that he attended the deceased during the year 1812, sometimes as often as three or four times a week; he continued to visit him pretty regularly down to the month of October, 1814; he was then absent till the beginning of December, when his visits were renewed, and continued till the end of the year 1815: the deceased was at all times very friendly with the deponent, who, independent of professional attendance, was living in habits of friendship with him, and from the frequency and length of his visits, he acquired an accurate knowledge of the state of the deceased's body and mind; that in consequence of a peculiar habit of body, he was liable to an occasional interruption of his mental faculties; the attack came on without previous notice, and at no particular or stated periods; he has seen the deceased frequently when under the influence of such attacks, the effect of which was to produce a total suspension of his mental powers; excepting upon these occasions the deceased was at all times in the years 1812, 1813, and 1814, and as long as he continued to see him, of sound mind, memory, and understanding, and had apparently



a perfect knowledge and recollection of his friends and acquaintance; he was capable of understanding what passed in conversation, and did at all times converse with the deponent and others in his presence, in a very rational manner." An hypothesis has been attempted to be constructed upon the evidence of this witness, that these fits had no effect upon the deceased's mind except when they were visibly present, producing this total sort of suspension of faculty, but that neither before nor after; and that therefore, unless the mental powers of the deceased were wholly suspended, the deceased was in his ordinary state. Now I cannot but think that what I have just stated from this evidence, is the sound result of Mr. Roberts' evidence; and that he by no means intends to give any other opinion; and if he did, it would be at variance with all the other evidence in the cause. No doubt his faculties were affected at the approach of a fit, and perhaps still more after it was over; sometimes it did not come to a fit, and yet he was affected, it being kept off by the medicine;—he took valerian;—and it continued for some time in a greater or less degree. The witness goes on to say, "he was fond at times of an innocent joke; he says, also, he has gone into the room occasionally in the morning when the deceased was reading in the bible or prayer-book, and he did not leave off reading immediately, but read aloud to the end of the chapter, or some verse where he could conveniently stop." All these facts speak for themselves. There is another part of his evidence, however, which is deserving of still

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more attention ; for it relates to the deceased's capacity for business. He says, that every year the deceased was in the habit of desiring the deponent to send in his account to the close of the year ; the deponent accordingly did so, charging to the deceased the medicine which he had supplied ; and within a few days after the deponent always received from the deceased an envelope, addressed by him containing the account which had been rendered, at the foot of which the deceased had added such a sum as he thought proper for the deponent's visits, which were never charged in the account. The two sums were cast up by the deceased, always making an even sum ; for which amount he enclosed sometimes bank-notes, at other times a draft on his bankers, filled up, and signed by him. The deceased either delivered it to the deponent if he happened to call, on which occasions he verbally requested the deponent to send him a stamped receipt at his leisure ;—if he did not see the deponent, the envelope was left at the deponent's house." He goes on to state, "that excepting when suffering from the nervous attacks, the deponent never witnessed in the deceased a want of thought, judgment, or reflection." He states another particular circumstance ;—"that he remembers having played at whist with the deceased on the 29th of September, 1814," that is, long after the last codicil ;—"that he played with him both before and after that time ;—but that is the only date to which he can depose. He played on that occasion against the deceased, and for money ; the deceased had a perfect recollection of every

point of the game, and played remarkably well;— and he concludes by stating, that during the last six or eight months before his death the deceased's mind appeared to be less firm than it had been, and it appeared to have given way."

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Now, in regard to what this witness says respecting the payment of his bills, the books of account have been referred to, and some observations have been made upon them in the argument. No. 117 is the bill which the deceased paid Mr. Roberts in January, 1813, and the account given by this witness of the mode of payment is to be recollected. The bill is paid in January, and here is a receipt to the bill, dated January 14th.— "Bromley, January 14th, 1813.—Received of Andrews Harrison, Esquire, the sum of thirty-five pounds, by payment of Mr. Paul Malin, for medicines and attendance to the 31st of December 1813, for self and partner.—William Roberts." And it is inferred from the circumstance of its being stated in the receipt to have been paid by the hands of Mr. Paul Malin, that it was not the deceased that settled this account, but that it was Mr. Paul Malin. Now Mr. Malin at that time kept the deceased's cash. Mr. Roberts says, that he sometimes received payment in bank notes, and sometimes in a draft upon the banker. Of course, if the deceased drew a draft, it would be a draft on Mr. Malin; probably he might be directed to pay it in money. It is charged in Mr. Malin's account of January, 1814; it certainly therefore was paid by him; and as Mr. Malin had got into difficulties, the deceased might desire it should be inserted in

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the receipt, "paid by the hands of Mr. Malin;" but I think there is nothing which proves the bill was not settled by the deceased himself in the manner stated by the witness. In the first place here is a sum added at the bottom for attendances; the bill is £29. 14s. 9d.; here is £5. 5s. 3d. added, making 35l.; the bill is endorsed "Roberts and Hott, 12th January, 1813, 35l." In the deceased's own hand-writing in the account-book, upon the 12th of January, 1813, is the entry for the 35l. paid to Roberts and Hott; in Mr. Malin's account current, here is upon the 12th of January, 1813, 35l. to Roberts and Hott. Now, all these entries being upon the 12th of January, I am led to conclude that the transaction between the deceased and Mr. Roberts was conducted upon that day, and that he then gave a draft to Mr. Roberts upon Mr. Malin; for Mr. Malin's receipt is not dated till two days afterwards; it is dated January the 14th; and therefore that perfectly accords with the drafts being drawn on January the 12th. Mr. Malin in his account enters it on that day; the receipt is not given till the 14th, which is the date when the draft was presented for payment, or when Mr. Malin was directed to call on him and pay him. But this is not the only transaction of the kind; here is a similar one in the next year, and which is a still more important period of time. January, 1814, here is Mr. Roberts's bill for that year £27. 12s. 10d.; the deceased in his own hand-writing thus adds to it £5. 7s. 2d. the two making together the even sum of 33l.;—here is Mr. Roberts's receipt for this sum;—here is on the back

of the receipt, in the deceased's own hand-writing, "Roberts and Ilott, 15th January, 1814, 33l.;" and in the deceased's cash-book here is "by Roberts and Ilott 33l.;"—but here is still more, for here is the draft drawn and filled up by the deceased himself upon his new bankers, Martin, Stone, and Company, for this 33l.; here is the corresponding part of the check filled up by him for this sum of money, so that here are these transactions of business completed in all their parts, and at most important periods of time proved by the clearest evidence, by the oral testimony of Mr. Roberts, without adverting to the exhibits, and by the exhibits brought in and admitted to be in the deceased's hand-writing. Now, that a man who can do all this, and yet from imbecillity of mind can do no testamentary act, however cautiously conducted, and however free from suspicion of fraud, is, I think, quite untenable.

The next witness is Mr. Wells. He was an intimate friend of the deceased, and the account which he gives of him is to this effect; that he was intimately acquainted with the deceased many years; who had a key of deponent's shrubbery, and used very frequently to walk therein; he frequently also came to deponent's house, and after the death of Mr. John Harrison, the deponent frequently dined with the deceased at Shawfield, and the deceased also dined with the deponent at Bickley, which intercourse continued till the deceased's death, but was less frequent during the last six or twelve months of his life. The deceased's mental faculties were then on the decline, and during that

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period the presence of the deponent brought back to the deceased's recollection those happy periods of his life when the deponent's father and uncle were living, and the deceased used to lament that those days were gone, and was affected by it. The deceased for many years was subject to nervous attacks, which were attended with a temporary loss of memory ; sometimes the attacks lasted only for a few minutes, at other times they continued longer, and except when suffering under those attacks, he believed him to be of perfectly sound mind, memory, and understanding, as perfectly as any man of his age whom the deponent ever saw ; he had a perfect knowledge and recollection of his friends and acquaintance, and of those about him. About the time of Mr. Malin's failure the deceased sent for the deponent to speak to him upon the subject of his affairs, when he found that the deceased fully comprehended the state of them, and from what then passed he has no doubt he was fully capable of managing them ; he shewed to the deponent the cash-account of Mr. Malin, which the deceased appeared to have balanced very regularly. He had no doubt the deceased was capable of settling bills, keeping his accounts, and managing his own affairs, without any assistance, or doing any act requiring thought, judgment, and reflection. He has been present when Mrs. Jukes has unnecessarily interfered to explain what she supposed the deceased not to have heard, and the deceased shewed some impatience at her interference. He goes on to state, " that the deponent was requested by the deceased to be present

at the opening of his brother's will; he then met the deceased for the first time after his brother's death; on seeing the deponent the deceased held up his hands, and expressed the greatest concern at the loss of his brother; he seemed to be in great distress, and said that he had lost his all."

The case set up is, that the deceased was so reduced to a state of second childhood, that he was perfectly unimpressed by the death of his brother, whereas it appears from this and a great deal of other evidence, that the deceased was most exceedingly oppressed and distressed by the death of his brother, and felt it most deeply. As to his playing at cards before the funeral, which was dwelt on at the bar, I confess, considering his state at the time, his deafness, and so on, and that cards were his usual amusement, it does not shew any want of memory, or any want of capacity, that he should wish, or that his friends should press him to play at cards at that time; it was a mere substitute for conversation, to which he was almost obliged to resort. As to his capacity for playing at cards, Mr. Wells says, "he did not consider him incompetent till within the last six months of his life, during which time he did not play with him; and, therefore, he cannot depose to his competency or incompetency; but he played with him within the last twelve months of his life, when it was the observation of the deponent's nephew, as well as himself, that the deceased played remarkably well: whether they then played for money or not he does not particularly remember, but he

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believes they did, and certainly the deceased was then fully competent to play for money."

In addition to this there is the evidence of the Rev. Mr. Walmsley, who was acquainted for 30 years with the deceased. He lived on terms of intimacy with him down to the time of his death. He saw him frequently while he resided at Chislehurst, which was till 1805, when he removed to London, and used, though more seldom, to see the deceased afterwards; and during the years 1812, 1813, 1814, and 1815, he, upon the average, visited the deceased, once a month: when so visiting, he almost always slept one night at Widmore; he had, therefore, frequent and very full opportunities of judging of the capacity of the deceased, a person quite as capable of judging, perhaps, as the witness, William Taylor; but he relates facts which give the Court an opportunity of judging for itself. He says, "that the deceased occasionally, when the deponent was obliged to be in London early in the morning, sent him in his own carriage, and upon such occasion the deponent having mentioned such his intention to the deceased, when he arrived at Widmore in the morning or before dinner, the deceased recollected it, and at the usual time in the evening, perhaps about eight or nine o'clock, he of his own accord gave orders to his coachman to be ready the next morning to take the deponent to London at the time required;" (now that shews understanding and forethought on the part of the deceased;) "and the deceased was very exact and particular in the directions which



he so gave. The last time this occurred was, according to the best of his recollection and belief, within the last six months of his life." (This is the person whom Taylor would represent as utterly incapable of giving any order whatever to any servant). He says, "that the deceased was subject to nervous attacks, which were attended with a total abstraction of thought, and suspension of his mental faculties; the attacks he witnessed never lasted longer than from ten to twenty minutes, and when they subsided, the deceased's faculties and recollection returned, and within an hour afterwards he was entirely himself again; that, excepting when under the influence of one of those attacks, the deceased was at all times, during the years 1812, 1813, and 1814, of sound mind, memory, and understanding; but he thinks that the deceased's faculties were not so strong during the last year of his life as they had been before, but he does not think they were materially impaired; that he had a perfect knowledge and recollection of his friends and acquaintance, and of those about him, except when under the influence of the before-mentioned attacks, during the last year of his life; not many months before his death, the deceased having seen the deponent from a window which looked down the road, as he approached the house, came out to receive him, and began immediately to converse in his accustomed good humoured and jocular manner; the deponent has gone into the room, and found the deceased reading the psalms and scripture lessons for the day, and he has heard him make remarks upon them

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which were both pertinent and sensible." He is stated by some of the witnesses to have read remarkably well, which could hardly be the case with a man who was reduced to childhood; and Stilwell says, he was accustomed to look out the psalms of the day himself, without assistance. Mr. Walmsley goes on to say, that within the last year or two of the deceased's life, he has been present when his coachman came in to settle his account with the deceased; the deceased looked over the articles, cast up the account, and paid it, without any assistance, and as far as the deponent observed, without difficulty. He states, that upon another occasion, a farmer, Fuzzey, brought his bill for corn; the farmer was called into the parlour, and the deponent is pretty certain that the deceased paid him at the time without assistance. He says that the deceased was certainly, in the deponent's opinion, at all times, when not under the influence of fits, fully capable of settling all such accounts, and paying his bills, without any assistance whatever, and was fully capable of doing any act requiring thought, judgment, or reflection.

It might be unnecessary to add to this, but even the witnesses produced on the *condidit* on their first examination, Mr. Ilott and Dr. Smith, confirm it. Mr. Ilott was acquainted with the deceased for eleven years, and he says, that during the last three or four years he attended the deceased almost entirely, and was in the habit of calling on him every second day; so that he had very frequent opportunities of seeing him; and

he says, on the second interrogatory, "that there was occasionally an absence of memory in the deceased, but that in general the deceased's memory and understanding were unimpaired during the two years before May, 1814." He says to the third interrogatory, "the deceased did not uniformly converse so as to satisfy the respondent that he was in complete possession of his mental faculties; there were times when he did not recollect the respondent—about five or six in number." So that in the course of three or four years calling upon the deceased three or four times a-week, there were four or five times, that is, not once in fifty times, in which the deceased did not recollect the deponent, which perfectly accords with Mr. Robert's account of those attacks. He says, on the 6th interrogatory, "that he has heard it said, that the deceased had become imbecile, and was incapable of managing his affairs, for some years before his death; but the respondent paid no attention to such report, because he knew the contrary to be the fact."

The Rev. Dr. Smith, who is the clergyman of the parish, who has known the deceased for above thirty years, says, "he was not in the habit of visiting the deceased for the last four or five years, previous to his death, but he called upon him occasionally. He remembers, after the 27th of April, 1814, meeting the deceased at dinner at producent's, they played at whist together in the evening; the respondent and the deceased were partners, they played two rubbers, and the deceased played as good a game as ever;—he was as

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perfectly in his senses as any man ; this was about a year, he says, before his death ;" that was long after the last of these codicils. Dr. Smith plays with him, Mr. Roberts plays against him ; Mr. Wells and his nephew are by-standers, seeing him play at whist, and think him a remarkably good player, and to suppose a man under these circumstances is so reduced to childhood, so lost to every thing he does, as not to be capable to do any testamentary act whatever, is really a situation we cannot very well consider as existing.

Now these are the leading features of the depositions of the witnesses, and the result is quite obvious ; they disprove the case set up of total incapacity. But to rebut the averment which was made, that the deceased was unable to manage his own affairs, and to pay his own bills, and to settle any accounts ; his own papers have been exhibited in the cause, and some of them (perhaps sufficient) have been already adverted to by the Court. Now here, in the first place is the fact, that the deceased did manage his own affairs ; that no other person is proved to have assumed that authority over them for him. Mr. Malin, first, and Mr. Kinleside afterwards, did overlook his brother's, Mr. John Harrison's, accounts, the deceased only supplying money ; but the deceased, down to a very late period of his life, kept his own private accounts, paid his own bills, drew his own drafts ; no evidence is produced to prove he did not do all these things himself : he might occasionally have a draft filled up by a friend who was with him, Mr. Kinleside or any other person ; but nothing further

is proved. Here is in several instances proof coming out incidentally, that he did the whole himself, without assistance.

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It was quite unnecessary, in my judgment, to examine further witnesses upon this point? the documents being in the hand-writing of the deceased, they are his accounts; and it lay on the other side to shew they were not kept by him, but by another person for him. One small part of the account-book, and one small part only, during the latter part of the year 1812, has been attacked in argument. As to many of the objections, the Court was satisfied, at the time, that they were unfounded; some indeed were given up, others were adhered to; but upon looking carefully into the accounts since, as far as a person not conversant with these matters may venture to trust himself, I think most or all of the objections are of little weight or erroneous. There are a few false castings up, and who does not make blunders of this kind? there are two entries of the same thing, one of which is afterwards erased; that has occurred in former years; things are entered on one side that should be on the other, but again, that species of mistake occurs in former years. There are great errors in page 49. Here is a deficiency of cash 149*l.*, I think, in the year 1810, and in the year 1809 a deficiency of cash, making a difference of 125*l.* Who does not occasionally omit entries of expenditure? but this is in 1809, when his capacity is unimpeached: there is in 1810 a deficiency of 105*l.* 6*s.* 7*d.*; little omissions of that kind occur in the former part of his life.

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The great circumstance relied on in the argument was, that there is quite a change in the principle of keeping the account, occurring about the middle of 1812, which can only be accounted for by the deceased's being incapable on account of Mr. Malin no longer assisting him in keeping his accounts :—it is stated, that one side of the account contains all his sources of income ; and the other all his expenditure ; and that he has entered sources of income twice over. Now, the objection is not quite correct in point of fact ; in his private accounts the mode in which he carries them on is this :—he brings forward his balance from the last year, and he includes in it, not merely cash in his own possession, but cash in his banker's hands also ; and he debits his private account with the aggregate conjointly, and then he goes on to debit the cash with the dividends his bankers from time to time receive. In this year, till September 17th, it goes on in that mode,—but then he adopts a different mode, and from thence to the end of the year, and the beginning of the following year, when he transfers his account to the new bankers, he proceeds in a different way, for he debits cash, with monies paid by, or received from, Mr. Malin : but he does not debit it with the dividends Mr. Malin receives, but finally with the balance paid to the new bankers by Mr. Malin. Is there nothing to account for this but the incapacity of the deceased ? This was the time that Mr. Malin had fallen into his difficulties ; when the deceased did not know what money he should get from him. It begins on the 17th Sept. : the monthly account

for September is in a different hand-writing, and then from that time to the time of appointing his new bankers, he only debits cash, as I have already stated, with the sums which Mr. Malin had actually paid for him. It was a mistake of the counsel to suppose that he debited the things twice over; the dividends are not debited—indeed the dividends on the April payments, 117*l.* were not debited at all; the dividends due at Michaelmas on Long Annuities, the dividends due at Christmas, on the 3 per cents. are not debited in the cash account, but only what Mr. Malin pays for him; and the money which he finally pays over to the bankers: he, therefore, does not do it twice over, and I think, considering the difficulties into which Mr. Malin had fallen, the deceased, instead of considering his money as cash, as the dividends should arise, was right in only considering it in the way I have already stated; if the deceased was in error in this respect, it is an error not very unnatural, and which persons, I hope, in their senses may fall into: for it appears to me the proper course for a man under those circumstances to have adopted. I will not debit the account with the sum in my banker's hands, which I may not receive on account of his difficulties; but I will debit the account with the money as it is received from him.—It was said he does not balance his account at the end of the year. No, he did not, because, at the end of the year, Mr. Malin had not settled his account with him. He renders the account for January, and pays over the balance to Martin, Stone, and Co.; but when

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he settles his final account with Mr. Malin, and the balance is paid over to the new bankers, he debits his cash account with that balance, and he goes on from that time to the time of his death in the same way ; in addition to this balance, the dividends as they are from time to time received ; first, his own dividends, and afterwards the dividends of the residue of his brother. Perhaps after this observation it will be quite unnecessary to advert to trivial circumstances ; but there are many minute circumstances in these accounts which impress one with exactly the same sort of conviction, that the deceased completely understood them. In the January account there are two balances paid to Martin, Stone, and Martin, one on the 15th of January, 113*l.* 14*s.* 8*d.* ; the other on the 28th of January, 305*l.* 18*s.* 6*d.* making together 419*l.* 13*s.* 2*d.* ; the deceased, in transferring this into his private cash account from Malin's account, does not enter them separately, as a mere copyist would do, but he enters the 419*l.* 13*s.* 2*d.* in one sum, as commencing the new account with his bankers, and then, from time to time, he enters his dividends.

Now these accounts, with the bills regularly paid and indorsed, these drafts drawn, these counter checks registered and marked with the date and sum for which they were drawn, the corresponding entries in the book of expenditure, prove mind and understanding, and thought, judgment, and reflection very strongly, and in a person of his great age of a most extraordinary and unusual degree.



The instrumentary evidence does not conclude here; there are several letters written by the deceased himself, some at very important periods, which have been exhibited, and one or two of them have been already noticed. I will only mention the others, because they are not liable to the insinuations made against the accounts. Here is a letter of the 10th of February, 1814, addressed to Mr. Kinleside; and, therefore, it could not have been written with his assistance: "*Dear Kinleside, I have received yours this morning. Mrs. Jukes continues much the same. I shall send the carriage for you to Sutton, and hope you will bring Mr. Perry with you. I have not time to add more. Yours, most affectionately, Andrews Harrison.*" Addressed to "*The Reverend Mr. Kinleside, Angmering Parsonage, near Arundel, Sussex.*" and with a post-mark upon it. No person could write a more proper letter.

"*Widmore, 12th February, 1814.*

"*Dear Sir, Mrs. Jukes has received your letter this morning, but being confined to her bed with a bilious fever*"—(and, therefore, she could not assist in this letter)—"*cannot have the pleasure of receiving her*"—(meaning Mrs. Kinleside, I presume)—"*at the time proposed, but hope to have the satisfaction of seeing you at that time, as my affairs require your assistance. You may depend on the sending the chariot as usual to Sutton. I am most sincerely your's, Andrews Harrison.*"—Addressed like the former.

Another letter, dated 3rd of March, 1814, coming nearer to the time of this latter codicil, is also

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addressed to Mr. Kinleside, "*Bromley, 3rd March, 1814. Dear Sir, Joseph shall be with you at Sutton, with the horses only, on Monday, and I shall be happy to see you with Mrs. Kinleside, when I hope you, with Mr. Stanley, will be able to settle the executorship business. We have not yet fixed on the time for removing to the other house.*"—It is proved that it was intended by him to go to Shawfield, but that intention was afterwards given up.—"*We have not yet fixed on the time for removing to the other house, but shall wait till we have the pleasure of seeing you, and hope you will meet with a supply for Sunday*"—a supply for his church he means.

Another letter of the same date, is to Mr. Roe, who resided at Worksop, in Nottinghamshire, and was a devisee of the property the deceased had in that quarter of the kingdom:—"Bromley, 3rd of March, 1814. *Dear Sir, I am much obliged to your father for his kind present of forest mutton, which was received safe, and at the same time informed me of his enjoying good health, which I sincerely hope may long continue, as well as that of your mother's and brother's, to whom I send my kind compliments. I have lately suffered in a most severe loss by the death of my brother, whom I sincerely loved, and shall ever regret.*" This is a gentleman who is so great a child, that he has forgot his brother is dead, and has no impression of the loss he has sustained. "*I observe that you have felt the late inclement season. I never remember such a fall of snow, and the frost has continued to this day. My best*

*wishes for the happiness of yourself and family, I remain yours, most sincerely, Andrews Harrison."*

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Another letter on the 23rd of January, 1815, is addressed also to Mr. Richard Roe. Dear Sir, *I am very much obliged to your father for the very fine mutton which he has been so kind to present me with, which arrived safe on Tuesday last. I beg you and father, with all the family, will accept of my sincere and most friendly wishes that you may long enjoy many happy returns of this season. I am, dear Sir, your sincere friend and humble servant, Andrews Harrison."*

These are the documentary parts of the evidence; and what is the result to be drawn from them in respect to general capacity? Why, that the deceased was very far advanced in life, was subject to occasional nervous attacks, which might lead ignorant or prejudiced observers to mistake or distort his condition to that of general incapacity, which might mislead occasional visitors, or those who had only a few opportunities of seeing the testator, to the same conclusion;—which might expose the deceased, when he was agitated, and anxious and nervous, and attempted some complicated business, to become confused, and his memory to fail him; but in his general and ordinary state, it is proved to my satisfaction that he possessed his mental faculties in an extraordinary degree considering his great age, and that he had a testamentary capacity quite equal to a testamentary act of no very complicated nature.

Still the infirmities of great old age; the deceased

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being subject to these attacks, and these codicils altering a will very deliberately made, it is necessary, where undue incitement and circumvention are imputed, to look with vigilance into the acts themselves.

The two first codicils, that of the 31st of August and the 2nd of September, 1812, may be considered together as in truth constituting one instrument, and the principal witness to this is the cautious and respectable witness, Mr. Edward Boodle; and the account which he gives is this:—

“that he attended the deceased by appointment on the 31st of August, 1812; he cannot, from recollection, depose with certainty who were present; he believes Mr. Trevillian was present; the deponent remembers generally that the deceased told him he wished to make a codicil to his will; he stated also that there were some pictures and books, which he had received from a relation of Mr. Trevillian, and which he felt himself under a promise or obligation to leave to Mr. Trevillian.” It is to be observed, that Mr. Boodle states this merely from recollection of what passed in conversation between him and the deceased; it is no part of the written documents or instructions; probably he understood the deceased rather too strongly; the deceased could not have understood that there was any old promise or any moral obligation existing, as to those books and pictures to give them to Mr. Trevillian, for he had disposed of them in different ways before: he gives them now to his brother for life, then as part of his residue, then to Mr. Benjamin Harrison, with Shawfield, unless the

residue is under a certain sum, and if the residue does not exceed that sum, then they are to compose part of the residue. At this time, when he was angry with Mr. Benjamin Harrison, he might feel no great disinclination to separate them from the Shawfield property, and, seeing Mr. Trevillian there, and having received the books and pictures from a relation of his wife, he might say, I ought to give them to Mr. Trevillian: he does not afterwards adhere to that; but this is not extraordinary either if he should afterwards become reconciled to Mr. Benjamin Harrison, or if he should determine on giving the Shawfield property to Mr. Kinleside, again meaning to let the books and pictures go with the house.—Mr. Boodle says, “that the instructions for the codicil were given to the deponent by the deceased himself, by word of mouth, without the interference of any other person, and taken down in writing in the margin of the drafts of the two former codicils. The deponent arranged with the deceased the day on which he would attend him with the codicil for execution, and, as the deceased expressed some anxiety about it, the deponent named the earliest day; and being anxious about the alteration in regard to the pictures and books, the deponent did not consider it at the time so much a codicil to be regularly executed, as a clear expression of what the deceased then intended, and to be effectual, in case any thing should happen before the deponent could return with the codicil he was about to prepare.” He states, “that he brought distinctly to the deceased’s recollection what he had

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done in regard to those pictures and books, as well by his will as by his codicil, and having obtained from him a clear and unequivocal expression of his wish, he wrote in the margin of the codicil he was about to alter the disposition which he wished to make of the books and pictures, expressing in it not only the person to whom he did leave them, but the two persons to whom he then said he did not mean to leave them, though he had left them to the one by his will, as part of his residuary personal estate, and to the other by a codicil in express terms." Nothing could be more cautious and proper than the conduct of Mr. Boodle upon this occasion. The servant Taylor is then called in, and this small codicil in the margin of the other is signed by the deceased, and attested by Mr. Boodle and Taylor. He says "that on the 2nd of September, 1812, he went again to the deceased at Widmore, pursuant to appointment, and he took with him the codicil which had been drawn out, and was prepared for execution, which he read over to the deceased, who pointed out an omission in regard to the appointment of the Rev. William Kinleside as one of his executors, for which he had given instructions to deponent on the former day: the deponent had then taken it down in writing in the margin of one of the draft codicils; but which not being before the person who drew the codicil at the time he so prepared it, that part was omitted. The deponent accordingly, by the deceased's desire, introduced the words 'constituting the Rev. William Kinleside executor agreeably to the deceased's request

and former instructions:’ this being done, and the codicil having been carefully read over and fully explained to the deceased, with reference to his former testamentary dispositions, which were then before them, and the deceased being entirely satisfied with it, and having expressed his approbation of it, the witnesses were then sent for.” Taylor and Coleborn came in—the instrument is executed and attested: and Mr. Boodle adds, “that had any thing remarkable occurred before, or in the course of the execution, or afterwards, on that occasion, it would have made an impression on his mind.” He then goes on to state very fully his opinion of the deceased’s capacity at this time; and he adds, “the deponent was particularly careful to ascertain the state of the deceased’s mind and memory; he gave his reasons for every thing he did, and he was, in every respect, in a very fit state of mind to make any alteration whatever in the testamentary disposition of his property: the only particular thing which was apparent in the deceased, was a certain degree of irritation on his mind at Mr. Benjamin Harrison having refused to act as his executor.”—The credit and the accuracy of Mr. Boodle has not been in the slightest degree questioned in this case: indeed, the counsel for Mr. Benjamin Harrison have gone so far as to say, that every syllable which he has stated is perfectly correct and accurate. The Court is disposed so far to agree with them, as to think that his evidence has been given with most perfect integrity of mind, and intended to be most perfectly correct; at the same time, to mere parol conversation, in the

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course of this transaction, Mr. Boodle may be, like all other human beings, liable to some inaccuracy of recollection.

The two men called in, Taylor and Coleborn, who attest this act, depose to their belief of the deceased's incapacity—that he called Coleborn, Welsh, and asked if he was to sign “Governor;” circumstances which are not of the least weight against those facts spoken to by Mr. Boodle. Taylor, indeed, does not rely solely upon what passed upon this occasion, but he speaks from his general incapacity, as well as from what passed upon the occasion; and the argument has been pushed to the length of contending, that Taylor might be right, and that Mr. Boodle might be wrong, for that, from the middle of the year 1812, *the deceased had a latent defect of memory, which rendered him incapable of any testamentary act.* The Court would rather have expected to have heard some precedent or authority for such a position: that because the memory of a person may in some respects be defective, therefore it is not a testamentary memory. We very well know that memory is excessively different in different persons—nothing is more various—its powers are very different in the same person at different times, and more particularly at different periods of life; in old age it is much less retentive, and more liable to confusion. Lord Coke says, a man ought to have a “disposing memory,” so as to have an ability to make a disposition with understanding and reason: so says Swinburne—“if a man in his old age becomes a very child again, and is so for-



getful that he has forgotten his own name, he cannot make a will; but the infirmities of old age, which do not take away the use of reason, do not hinder them in that condition from making a will." Latent insanity we can understand, but latent defect of memory, shewing itself only occasionally, when, from bodily attacks or from confusion, arising from long and complicated transactions, a man may become defective in his memory—and rendered absolutely and permanently intestable, is a position for which I know of no authority. Mr. Boodle, it is true, certainly does not upon this occasion go through the whole items of all the will and codicils as a preliminary, in order to ascertain whether or not some latent defect of memory and confusion might not be discoverable, but he brings to the recollection of the deceased every thing connected with the particular disposition he has made, and the memory is so far found to be perfect, that Mr. Boodle is quite satisfied as to the capacity upon that occasion. The Court has something better—the Court has the instrument itself before it, dictated by the directions of the deceased himself, for Mr. Boodle says he received no assistance whatever—it was his own instructions from his own mouth; and in that instrument it is recited, "that whereas Benjamin Harrison, of Guy's Hospital, Esq. having declared his intention not to act as an executor of my will, I do therefore hereby revoke the appointment of him as one of my executors, not only in the event of my dying in the life-time of my brother, John Harrison, but also in the event

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of my surviving my said brother ; and I do hereby appoint the Rev. William Kinleside to be an executor of my will, as well in the former as in the latter event ;” and then he goes on to recite, that whereas by his codicil he had given the books and pictures, in case of surviving his brother, unto the said Benjamin Harrison, his executors, administrators, and assigns ; he revokes that, and now gives them to Mr. Trevillian, &c. ; he recollects then the grounds of the alterations—delusion of mind is in no degree suggested or imputed—it is quite disavowed—the fact itself is proved, and has not been controverted. Mr. Benjamin Harrison did declare he would not act as executor with Mr. Kinleside ; he desired this intention to be communicated to the deceased ;—the deceased’s papers entrusted to his custody are returned to him ; he had removed from Widmore, and never after September, 1812, kept up the least intercourse with the deceased ; then the facts being so, and the instructions, from the evidence of Mr. Boodle, coming thus voluntarily from the deceased himself, and stating these facts, to maintain that there is any latent want of disposing memory, or any thing that can justify Taylor’s opinion of the incapacity at this time, I can hardly think could have been meant to be seriously contended by the advocates of Mr. Benjamin Harrison.—But here is not only memory, but an activity of memory quite extraordinary. Under the will Mr. Kinleside was only an executor in the event of his surviving his brother ;—Mr. Harrison was so in both events ;—he gave instructions not only to revoke Mr. Harrison

in both events, but to appoint Mr. Kinleside in both events. Mr. Boodle's clerk omitted that provision,—the omission escaped Mr. Boodle himself: but the deceased, on the codicil being read over to him, observes it;—it is rectified and interlined in the instrument. Under these circumstances I can have no doubt in pronouncing for these two codicils.

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In respect to the other codicils they stand on different evidence, and are contested upon additional grounds:—those two other codicils may in effect be considered as constituting one instrument, that of the 21st of March, 1814, being included in that of the 27th of April following; and as to this latter codicil, holding that the deceased's permanent incapacity is not proved, and the instrument itself, one duplicate of it at least, being in the deceased's own hand-writing, the three attesting witnesses, and a fourth person who was present, speaking to the reading over, the execution, and the capacity at the time, there would be *primâ facie* proof it was the free act of a capable testator. But the act may be impeached by proving it was obtained by fraudulent incitement and undue solicitation practised on a weak and unresisting capacity; and therefore this is the point on which the Court is called to examine this part of the case; and it necessarily opens to some other parts of the evidence, namely, that which sets forth the previous intentions of the deceased, the grounds of change of disposition as to Mr. Malin and Mr. Harrison, and the manner in which this codicil was executed.—The deceased's regard for Mr. Benjamin Harrison is men-

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tioned in the will itself, and the other testamentary instruments fully establish it ;—though of the same name, Mr. Benjamin Harrison appears not to have been related to the deceased. His connexion appears to have grown principally out of some transactions and services which he had rendered to the brother John Harrison ; but he at length became an object of the increasing kindness and testamentary bounty of both brothers. He came to reside at Widmore for the purpose of being near them ;—and in the year 1808 he was the devisee of Shawfield Lodge, under the contingencies already stated. Under a former instrument it appears from the evidence of Mr. Boodle, that the Shawfield Lodge estate would have gone to Mr. Kinleside as the residuary legatee ; but this regard to Mr. Benjamin Harrison operates both ways, if there was no breach of this regard, it would operate strongly against the change of disposition ; but on the other hand, if there was not only a quarrel, but a total discontinuance of all intercourse, the former regard and intended kindness would tend to render the subsequent sense of unkindness and ingratitude deeper, and constantly rankling in the mind of the deceased ; that a breach did take place between them, that Mr. Benjamin Harrison declared he would not act as executor with Mr. Kinleside ; that in consequence of such declaration the deceased made the codicil I have already pronounced for, is fully established ; and in making that codicil there is not the slightest appearance of fraud, circumvention, or undue incitement, because it is not suggested even in the plea, to have taken place till after the

death of the brother. The cause of the breach originates in the difficulties of Mr. Malin, who had already received 13,000*l.* of these brothers, and who owed the deceased about 5000*l.*, besides some other sums, on account of business and interest, because I observe in Mr. Malin's account of Benjamin and John Harrison, there was a considerable balance in the month of December, 1812, and that does not appear upon the evidence to have been paid over to the deceased. Now these difficulties, which took place sometime about the summer of 1812, appear to have occasioned to the deceased great anxiety of mind ;—that is a part of the case of the opposer of the codicil. He does not consult Mr. Benjamin Harrison upon them, or if he did, he was not satisfied with the advice that he received ; for he consults his friend Mr. Wells upon the occasion, and Mr. Wells states, “ that the deceased was accustomed to apply to him for friendly advice, in any circumstances of difficulty ; and that in June, 1812, the deceased applied to the deponent on the subject of the affairs of Mr. Paul Malin, a young man to whom the deceased had advanced large sums of money, and who had then stopped payment. The deceased was in great distress of mind ; and the deponent upon that occasion recommended him to send for his relation, the Rev. William Kinleside, a clergyman residing in Sussex, of whom the deponent had always heard the deceased speak in terms of the greatest affection, and who being, as the deponent believed, the adopted heir of the deceased and of his brother, was, in the opinion of the deponent, the most proper

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person to be consulted by the deceased, under the circumstances in which he was placed. The deceased acceding to that opinion, the deponent, by his desire, wrote to Mr. Kinleside, who came accordingly. The deponent acquainted Mr. Benjamin Harrison with his having so written to Mr. Kinleside; from that time the deponent had no communication with the deceased upon the subject of his affairs, till after the death of his brother." He states on his second examination on the fourteenth article, "that the deponent never did attempt to influence the deceased against the said Benjamin Harrison, or in favour of the said Mr. Kinleside, or ever say one word to the deceased to induce him to make any alteration whatever in his testamentary dispositions in respect to the Widmore estate, or any other part of his property. There are two occasions in which he remembers to have spoken to the deceased of Mr. Kinleside in favourable terms;—one was after Mr. Benjamin Harrison had declared his determination not to act as the deceased's executor with Mr. Kinleside, on which occasion the deceased applied to the deponent to be an executor in his stead; and, in resisting the persevering application of the deceased to that effect, the deponent told the deceased that he could not have better executors than Mr. Stanley and Mr. Kinleside, and he believes he did then speak of Mr. Kinleside as a man of honour and a gentleman;—the other occasion was soon after the failure of Mr. Malin, as it was in consequence of Mr. Kinleside's having come up at the request of the deceased to investigate his accounts. The de-

ponent, in giving his opinion to the deceased of the conduct of Mr. Benjamin Harrison at a meeting which he had had with Mr. Kinleside, in the presence of the deceased and the deponent, when much irritating language was used, he spoke of the conduct of Mr. Kinleside as having been perfectly that of a gentleman ; and he spoke also in terms of disapprobation of the language used by Mr. Benjamin Harrison ; but he did not then or at any time say any thing to the deceased to the prejudice of the character of Mr. Benjamin Harrison to influence the deceased to do any testamentary act whatever that would be either unfavourable to Mr. Benjamin Harrison, or favourable to Mr. Kinleside."

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Now, the conduct and credit of this witness have been very freely canvassed in the course of the discussion. He is charged in plea with having together with Mrs. Jukes and Mr. Kinleside, urged and excited the deceased ;—of that charge at the period of time which the Court is now examining, namely, in 1812, and the beginning of 1813, there is not a suggestion ; for even Taylor does not suggest it till after December, 1813. The plea itself, as I have stated, does not charge it till after the death of Mr. John Harrison. What then is the character of Mr. Wells, and his conduct upon this occasion ? He is a gentleman of fortune, residing close to the deceased ;—he has not the slightest pecuniary interest in any of these transactions, or in the event of this suit. The deceased had resided for many years as an inmate in the house of his uncle and of his father ;—there must have been

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a sort of filial regard, a sort of hereditary friendship between this gentleman and the deceased, something of more than an ordinary sort;—it was not discontinued;—the strictness of intimacy between them is kept up to the end of his life. The deceased having a key of the shrubbery, often calls on Mr. Wells;—Mr. Wells calls on the deceased, and they often dined together. Mr. Wells is not a boy;—he is described as fifty-six years of age. Now what is so natural as that the deceased, when in difficulty, should resort to Mr. Wells for his friendly advice, and that Mr. Wells should give it him with sincerity, and with a degree of filial respect and attachment. What is the advice he does give him upon this occasion? He does not obtrude into the deceased's concerns;—he rather avoids it, and declines it;—he desires him to send for Mr. Kinleside. Now it does not appear that there existed at this time any particular intimacy between Mr. Wells and Mr. Kinleside. Mr. Kinleside was the most proper person to be sent for;—he was not only a relation for whom the deceased had expressed at all times the greatest regard, but he was the residuary legatee;—and therefore, whatever losses might arise to the deceased from Mr. Malin's difficulties, would ultimately fall on Mr. Kinleside, as the residuary legatee. Much indeed is said of fraudulent excitement and solicitation, but I have looked through this voluminous evidence in vain for the proof of it. Here is no clandestinity in any part of this transaction. Mr. Wells informs Mr. Benjamin Harrison, that by the desire of the deceased he had written to Mr. Kinleside;



—this is followed by an interview between all the parties :— Mr. Kinleside was apprehensive of loss, and might make offensive or unfounded charges against Mr. Benjamin Harrison ;—but it is done openly, he is present, and he has an opportunity of defending and justifying himself in the presence of the deceased and Mr. Wells :—Mr. Wells was a disinterested by-stander ;—he was a friend of the deceased, and meant to give him an honest opinion : which was right and which was wrong the Court has no sufficient means of judging. Mr. Benjamin Harrison might be very injuriously charged ;—he might be very justly indignant against Mr. Kinleside ;—he might think the opinion of Mr. Wells perfectly erroneous :—all the Court knows is, that Mr. Benjamin Harrison was a good deal irritated on the occasion, and seems to have used pretty strong language ;—but he not only used pretty strong language, but took pretty strong measures ;—he determines he will not act with Mr. Kinleside ;—he desires his determination to be communicated to the deceased ;—he delivers up the deceased's papers, which he afterwards confesses to Fuzzey he was very foolish in doing. All this induced the deceased to revoke his appointment of executor, and to appoint Mr. Kinleside in his place ; and it induced him also to revoke the bequest of the books and pictures, and to give them to Mr. Trevillian. When people are angry, whether with or without cause, they will allow their passions to suggest fraud or dishonourable conduct against others ;—but such charges must be supported by proof of the fact ; the Court cannot without evi-

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dence presume that fraud was committed. I see no appearance of fraud at this time in Mr. Wells's conduct, as far as I have hitherto examined it. I see nothing but what was perfectly honourable and disinterested, and what his friendship and regard for the deceased imposed on him as a duty. In the month of September, while the deceased is revoking the appointment of Mr. Benjamin Harrison from the office of executor, he declares what are his views in respect to Mr. Malin, and this does not rest upon any loose recollection of what passed in conversation between the deceased and Mr. Boodle, but it was at that time reduced into writing in the margin of the exhibit No. 3., where there is an entry made in Mr. Boodle's hand-writing:—"31st August, 1812, Mr. Harrison having lent to Mr. Malin 4500*l.* on bond, and 500*l.* on note, means to give him up both bond and note, and then to revoke this legacy of 5000*l.*" And here is a memorandum at the end of the draft of the codicil to this effect, from Mr. Boodle to the deceased: "I have not revoked the legacy of 5000*l.* to Mr. Malin, and Mr. Andrews Harrison should not deliver up his bond and note, unless he means him to run the chance of having 10,000*l.* instead of 5000*l.*, as Mr. John Harrison, if he survives his brother, bequeaths to Mr. Malin 5000*l.*" Then here it is quite clear, that it was not the intention of the deceased to give Mr. Malin both the legacy of 5000*l.* under the codicil, and the benefit of his bond and note, but that one was to be set off against the other.

It is however contended, in respect to Mr. Ben-

jamin Harrison, that if the deceased had intended to revoke the benefits to him under the will, he would have done it when he executed this codicil revoking the executorship, and that his doing it afterwards can only be accounted for by some fraudulent excitement practised upon him, and the taking advantage of his vacant faculties, and his loss of memory ; but to this inference the Court cannot proceed upon the evidence before it, and looking at the probability arising out of the facts, it was natural enough that the deceased, a person of calm and moral mind, should at first act with considerable forbearance towards a person for whom he had for a long time entertained great regard and confidence, it was necessary to provide for the executorship more immediately ; but he might naturally think he would give Mr. Benjamin Harrison more time to reflect, and consequently make advances towards a reconciliation, more especially as his brother was then living, and might survive him.—It is not quite correctly stated that he only felt regret at Mr. Benjamin Harrison having refused to act as executor with Mr. Kingleide ; for Mr. Boodle's words are, that " he observed a certain degree of irritation in his mind at Mr. Benjamin Harrison having refused to act as his executor ;" and without presuming fraud, I think there are sufficient circumstances to account for that irritation afterwards increasing. In the month of January following, Mr. Mañia becomes bankrupt. I understand the loss, therefore, which might be only apprehended in September, was then realized, whether to the exact amount of 5000*l*.

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or more, or less, does not appear; whether he received any dividend on the bond and note,—whether there was a balance of account of Andrews and John Harrison,—whether the interest was paid, I do not ascertain, nor is it, perhaps, very material;—but here is this fact, that a loss did occur by the bankruptcy. Mr. Walmsley states, that “he cannot depose particularly as to the time, but believes it was subsequent to 1812;—whether it was in the latter end of that year, or in the course of the following year, he does not remember. He having gone down to Widmore to visit the deceased, found him in a state of considerable irritation against Mr. Benjamin Harrison, of whose conduct he spoke in terms of great displeasure, but to the particular expressions which the deceased used, or to the cause of his irritation and displeasure, he cannot depose, further than that the deceased alluded to the conduct of Mr. Benjamin Harrison in not having apprized him of the proceedings of Mr. Malin, and protected him from the loss which the deceased had sustained by Mr. Harrison’s connivance or neglect.” Now, as the deceased was at this time in a state of considerable irritation, the supposed cause of it is the loss that had been sustained; probably it took place about the beginning of the year 1813. The deponent adds, “he did occasionally hear the deceased speak of Benjamin Harrison afterwards, but never in kind terms.”

Now, whether the deceased originally formed a right or a wrong judgment in imputing to Mr. Benjamin Harrison neglect or connivance, is not a question for the Court to determine;—such was his

impression. Here is no loss of memory in regard to it; and an increase of irritation is not extraordinary or improbable.

Mr. Boodle states, "that shortly before the death of Mr. John Harrison," which was in the latter end of 1813, "the deceased expressed to the respondent, who was then at Widmore on other business, a wish to alter his will; but it was thought by Mr. Wells, a neighbour and friend of the deceased's, Mr. Kinleside, and the respondent, that, considering the circumstances under which this will had been made, and the state in which his brother then was, which was that of total incapacity, it would not be a proper proceeding, and it was then abandoned." The wish and intention therefore to alter this will is here observed to be going on;—it shews itself shortly before the death of the brother. Mr. Boodle, it seems, had an opinion that no alteration ought to take place; and at that time, to a certain degree, he might be right. Mr. John Harrison was not in a condition to make a corresponding alteration, and if he should survive the deceased, not only his residue, but the residue of Andrews Harrison's property, would pass under the will of John Harrison;—Andrews Harrison, therefore, could not alter his will without in some degree defeating his brother's disposition of the residue, and he had no power over his brother's residue unless in the case of surviving him: it seemed therefore by no means improper or unnatural, as John Harrison was approaching his dissolution, that these gentlemen should advise, and the deceased acquiesce in abandoning the matter, or at least in postponing it; but the de-

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cease of his brother no sooner takes place, than we find Mr. Andrews Harrison again expressing his wish to proceed to the alteration of his will, and taking measures for that purpose.

Mr. Wells states, upon his first examination "that soon after the event of the brother's death, the deceased, in conversation with him, expressed his dissatisfaction and regret at the disposition he had made of some parts of his property, but more particularly in regard to Shawfield Lodge and estate, which had been his brother's residence ; the deceased was evidently uneasy at the contents of his will as it then stood ; he expressed his wish to have it altered, and repeated his distress of mind on different days. In the beginning of the month of December, 1813, as he now best recollects, the deponent, by the desire of the deceased, met Mr. Boodle, the deceased's solicitor, at the house of Mrs. Jukes. Upon that occasion Mr. Boodle's conduct is detailed ; and then the meetings took place upon the 7th and the 14th of December, which I have already examined. The deceased upon those occasions endeavoured to do too much ;—he had undergone much agitation and distress of mind, during the illness and after the death of his brother ; he was worse at that time, the thing is attempted without success, and remains undone ; but, as to the deceased's wish and desire to revoke the benefits to Mr. Benjamin Harrison and Mr. Paul Malin, nothing could be more clear than upon both the occasions of those meetings in December ; all the witnesses, and all the memorandums then made, manifestly declare that to have

been his wish. Indeed, the objection is of another sort ;—not the want of volition, but too great volition, too much irritation on the occasion : how produced ? By fraud. Where is the proof of this fraud ? Even Taylor does not speak of any thing till after these two first meetings had taken place. Mr. Kinleside, on the 10th of December, when he calls on Mr. Boodle, rather seems averse to any alteration taking place ;—and it is not clear by the evidence, I rather think it is otherwise, that he was present at the meeting on the 14th of December. No person present at either of the meetings attempts to excite the deceased on the occasion. Whatever irritation therefore existed in the mind of the deceased, existed without any proof of circumvention ; and it is not very extraordinary at that period of time :—for, what were the circumstances ? John Harrison had lately died, to whom the deceased was most affectionately attached. He, as well as the deceased himself, was the intended benefactor of Mr. Benjamin Harrison. Mr. Benjamin Harrison was the executor of Mr. John Harrison ;—he does not act as his executor ;—he does not call on the deceased ;—he does not, as far as appears, write a letter of condolence to the deceased on the occasion, or take the least notice of the event of the death of Mr. John Harrison. The apology offered by counsel is, that he might not choose to expose himself to the insults of Mr. Kinleside or Mrs. Jukes. In the first place, with respect to Mr. Kinleside, he was much more absent at that time than present ; and as to the danger of Mr. Harrison being insulted by this old lady of eighty years

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of age, it was not a very formidable danger, nor justly apprehended; for when Mr. Andrews Harrison calls, Mrs. Jukes, with great kindness, says, "I am sure, Sir, you will be glad to hear that Mr. and Mrs. Benjamin Harrison and all the children are well, at Guys." The deceased naturally enough considering what was passing in his mind, and if he did retain his memory and capacity, merely muttered,—“I am glad to hear it;” or something to that effect, in a tone and manner not distinctly to be heard.

In March following the deceased himself appears to be active again, and writes to Mr. Boodle to come and make a codicil for him; it does not appear that Mr. Kinleside was even at that time at Widmore. Mr. Boodle writes a letter as to an intelligent agent, proposing to be with him on the 21st of March;—by accident he is prevented attending on that day, but the deceased appears to have expected him, and seems to have prepared himself for what should have taken place; for it is on the 21st of March a codicil is written, and it is very fairly written, in his own hand-writing:—“*It is my wish that Shawfield Lodge estate and premises should go to my residuary legatee, the Rev. William Kinleside, and that I revoke my legacy left to Paul Malin, Andrews Harrison. Widmore, 21st March, 1814.*” On that day Mr. Boodle however was under the necessity of putting off his visit to the 22d, when he and Mr. Stanley did attend, and perhaps the very disappointment might have had some effect on the deceased’s mind;—but on the



22d of March, nothing can be more decided than the deceased's desire to exclude Mr. Harrison and Mr. Malin, and to give Shawfield to Mr. Kinleside ;—it being the first part, and the middle part, and the last part of that paper and memorandum which Mr. Boodle drew up upon the occasion. The deceased was too confused, in Mr. Boodle's opinion, to induce him to make a codicil ;—but, as to all this being a fraud on the deceased, the very circumstance of sending for Mr. Boodle on these three occasions, the 7th of December, 1813 ; the 14th of December, 1813 ; and the 22d of March, 1814, goes very strongly to repel the insinuation.

Thus far, considering these circumstances, that Mr. Benjamin Harrison had wholly withdrawn himself from the deceased, and never called on him, it does not require the gratuitous assumption of fraudulent excitement in order to account for this increased irritation against him ; but it requires some proof of the solicitation and importunity charged, and this brings me necessarily to consider that part of the evidence, for it is only about this period, namely, in the beginning, and in the spring of 1814, that there is the slightest attempt to support the charge by any thing like evidence.

I may, perhaps, preliminarily observe, that importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency ;—it must be such importunity as he is too weak to resist ;—such as will render the act no longer the act of the deceased ;—not the free

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act of a capable testator, in order to invalidate an instrument.

Now, the charges themselves pretty well, I think, answer each other :—for, if the deceased was thus anxious, even to irritation, to deprive Mr. Benjamin Harrison of these testamentary benefits, where could be the necessity for all this urging and importunity? The two grounds are hardly consistent with each other. As against Mr. Wells, it is Taylor alone who suggests it;—he pretends indeed that the deceased being very deaf he could not avoid hearing what passed as he went to and fro along the passage. I think, on the 8th interrogatory, he states, that early in 1814, before the month of March, the respondent heard Mr. Wells, and he mentions Mr. Kinleside also, continually persuading the deceased to take away the Widmore estate from Mr. Benjamin Harrison, and leave it to Mr. Kinleside.

Though the deceased was very deaf, though the house is described as very small, he is the single witness who overhears any thing of this kind. The other witnesses, the maid-servants, hear nothing of the sort, so far as respects Mr. Wells;—and Mr. Wells has most decidedly and positively denied the charge upon his oath. Now, upon the evidence of Taylor, I do not think the fact of urging the deceased, as charged against Mr. Wells, in any degree proved, and therefore it is unnecessary to consider what would be its legal effect. Alexander is a witness entitled to more attention; she does overhear Mr. Kinleside and Mrs. Jukes say

that to which she deposes, but nothing concerning Mr. Wells ; at the same time, without deducting from her veracity, yet considering how likely any conversations are to be misapprehended, considering how much more likely pieces and patches of conversations are to be misapprehended, the witness not being present, and hearing the preceding and following parts, the Court must attend to evidence of this sort with considerable caution ; more especially when it is to conversation with a person who is liable occasionally to interruption and confusion of faculties, and Alexander had been talked to and urged a good deal by Taylor, who had related to her many things she did not recollect, and who said her memory was very bad, and therefore without meaning to say any thing beyond the truth, she might have confounded what she heard from Taylor with what she heard herself, wishing not wilfully to forget any thing.

But, taking it at the utmost stretch, what does it amount to ? Her account is this, " She never heard Mr. Wells say any thing to the deceased upon the subject ;—she knows that he was there very often ;—he used very frequently to call on the deceased, though not more at one time than another ; but she never heard him say any thing about his will, or the Widmore estate to the deceased :—she has heard both Mrs. Jukes and Mr. Kinleside conversing with the deceased about his will, and about the said estate ; she remembers, that for some time before the last codicil was made, which was in the month of April, 1814, she heard Mrs. Jukes tell the deceased that he ought to alter

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his will ;—the only persons the deponent heard mentioned by her were Mr. Malin and Mr. Benjamin Harrison, and she told the deceased that he ought to alter his will, because if it was not altered Mr. Malin would have that money again, which he ought not, for he had acted very improperly, or something to that purpose. The deponent never heard her say who ought to have any thing ; and she does not know that she ever heard Mrs. Jukes say any thing to the deceased about Shawfield or the Widmore estate, she cannot recollect it if she did ; the principal thing she said was about Mr. Malin, who she said would have the money if the will was not altered, and that he ought not to have it.”—Here then is no fraud and no falsehood in all this ;—it is correctly true ; it is no more than what the deceased himself had expressed to Mr. Boodle, in September, 1812 ; the deceased himself then thought that Mr. Malin ought not to have the 5000*l.* he owed him and also the legacy of 5000*l.* ; —even supposing therefore that nothing had preceded what this witness overheard, that the deceased had been talking with Mrs. Jukes, and that she merely re-echoed his opinion, was this any thing like fraudulent excitement to remind him that such a thing should be done ? Looking at these facts, it does not appear to me to amount to that which can affect the instruments.

The witness then goes on ;—as to Mr. Kinleside she says, “ She has often heard the deceased and Mr. Kinleside in conversation together upon the subject of the Widmore estate ; they used to go together into the deceased’s room, up stairs, where

they were for a long time together frequently ;— the deponent does not think she ever heard any thing that passed when they were there ; but she remembers hearing them talking when they came out of the room upon the landing-place, and in the passage she recollects the deceased's saying to Mr. Kinleside, the house is your's ;—No Sir, said Mr. Kinleside, the house is not mine ; the house is Mr. Benjamin Harrison's. The deceased said he meant the house to be his ; that Mr. Benjamin Harrison had offended him. Mr. Kinleside said, the house could not be his, as it was not left to him. The deponent cannot remember the exact words, but it was to that effect ; for the deceased and Mr. Kinleside being both deaf, they were both of them obliged to speak loud, and the deponent sitting in her own room heard very distinctly what was said."—Again, taking all this at the very worst, after these two persons had been, as the witness says, for a long time together in the deceased's room, looking over this long will, when they come out, they are talking together on the landing-place loud enough to be heard all over this small house. What is the whole that happens ? The deceased appears to have got into some confusion, as he did after the transaction with Mr. Boodle ;—he says the house is your's ; Mr. Kinleside explains it, and says, the house is not mine, the house is Mr. Benjamin Harrison's ;—the testator says, Mr. Benjamin Harrison has offended him, and he means to give it to Mr. Kinleside. It is as little like urging on one side, and unwillingness on the other, as can be stated. She goes on further, " She several

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times heard the deceased say that Mr. Benjamin Harrison had offended him, and she also heard the said Mr. Kinleside say several times to the deceased that the house was Mr. Benjamin Harrison's ; it cannot be mine ; it is Mr. Benjamin Harrison's ; you have left it to him. And the deceased said he did not mean Mr. Benjamin Harrison to have it ; he meant him, Mr. Kinleside, to have it." This is all open to the same observation.

Now, as to the suggesting of the codicil, she says, " she does remember hearing Mr. Kinleside tell the deceased that he could not go through his will, and that he had better make a codicil. She well remembers that when they were talking about the estate, by which she supposed them to mean the Widmore estate, Mr. Kinleside did tell the deceased that he could not have it unless it was left to him. The deceased said he did mean him to have it. Mr. Kinleside then said, that there was no occasion for a fresh will ; that only a codicil was wanting ; that a will was too much for him to go through ; and that a codicil would do as well, or to that effect. She says, that she never heard Mr. Kinleside press the deceased not to employ Mr. Boodle, or observe that he was too particular, or say any thing to the deceased about Mr. Boodle. She well remembers that the deceased was very angry with Mr. Benjamin Harrison ; he was very much disturbed at his sending home some papers, as she believes, and refusing to act for him ; he cried so much about it that the deponent was distressed to see him ; that she frequently heard him talking about taking away the estate from Mr.

Benjamin Harrison ; he was quite bent upon it." —Taking the whole of this account, and considering it judicially and impartially, it seems to tend rather more to the support than to the defeazance of these codicils: the Court is not called upon to decide upon nice points of delicacy in the conduct of parties, but to consider their legal effect, not whether Mr. Kinleside ought to have practised more forbearance and self-denial, and that he ought not to have put the deceased into the way of carrying his wishes into effect, because those wishes tended to his own benefit ; but what I am to consider is, whether he was guilty of such fraudulent importunity on the deceased as can defeat the effect of a codicil which is in other respects proved, and render it not the act of the deceased.

The deceased upon this evidence, instead of being urged to take away the property from Mr. Benjamin Harrison, and give it to Mr. Kinleside, Mrs. Alexander says, " he was quite bent upon it," and the utmost is, that Mr. Kinleside sets him right when he says he is to have the house, and explains to him that the best mode of carrying his intention into effect, is not by making a new will, but by confining himself to a codicil, he having on former occasions been found to have failed in making these new dispositions which were proposed. I think that is the utmost extent to which I can carry this evidence.

Mr. Wells, to whom as much credit appears to be due as to any witness in the cause, the Court making allowances for the slight inaccuracies which belong to all human testimony, however fairly it is

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given, carries on this transaction, and says, "that after the 22d of March the deceased appeared to be disquieted and unhappy; and he particularly recollects, that one morning within a few days after he was walking with the deceased in the grounds of Shawfield Lodge, the deceased expressed his unhappiness, that according to the then state of his will, that property would go to Mr. Benjamin Harrison, which he particularly wished to leave to Mr. Kinleside. That shortly afterwards the deceased shewed to the deponent a paper-writing, drawn up and prepared for execution, as a codicil to his will, and which he stated to have been drawn up at his request by a legal friend of Mr. Kinleside's, who, as the deponent has since understood, is a Mr. Holmes of Arundel. It is not wholly immaterial as referrible to another part of the evidence, that the deceased at that time did not mention by whom this paper was prepared, all he said was, that it was by a legal friend of Mr. Kinleside's; but whether that legal friend might reside in London, or in Sussex, the deceased does not appear at that time to have mentioned; he might have supposed it was in London. He says "that the deceased expressed a wish to execute the codicil, and desired the deponent to call upon a Mr. Latter, a solicitor residing at Bromley, upon the subject. The deponent accordingly did so, and consulted with him upon it. The deponent never had the paper in his possession, and knew not of its existence till it was shewn to him by the deceased. The deponent mentioned to Mr. Latter,



at the time he delivered the deceased's request for him to attend, what the deceased had communicated to him respecting the preparing of such codicil, and asked Mr. Latter whether it was an irregular mode of proceeding. Mr. Latter said it was more regular for the person who had prepared an instrument to be present, but not absolutely necessary; and he then recommended that it should be copied by the deceased; and that the witnesses, besides himself, should be Dr. Smith, the clergyman of the parish, and the apothecary who was in the habit of attending the deceased. The deponent mentioned to Mr. Latter likewise the circumstances attending the visits of Mr. Boodle to the deceased. He then communicated to the deceased what had so passed between himself and Mr. Latter, and the suggestion of Mr. Latter, that the paper should be copied by him; to which the deceased acceded." He goes on, and states, "that a few days afterwards he, at the earnest desire of the deceased, went to the house of Mrs. Jukes," where the execution took place.

Now certainly in this account there does occur a circumstance in the preparation of this instrument, that always excites the jealousy and vigilance of the Court,—and it has been much pressed in argument;—the codicil is prepared through the agency of the party benefitted, and without the professional person who prepares it having had access to the deceased for the purpose of taking his instructions: but the Court must take care not to convert a circumstance which is only a reason for vigilance and caution, into an actual defeazance

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of the right of testamentary disposition, and of the clear testamentary dispositions of a capable testator. The degree of alarm excited by such a circumstance depends upon the other circumstances which accompany it: the thing frequently happens, and without exciting much, though upon all occasions, a certain portion of caution.

It was observed in respect to this part of the transaction, that Mr. Boodle was not employed. Now, after the three unsuccessful attempts which had taken place, and the course which Mr. Boodle thought it necessary to pursue upon those occasions, it is by no means unnatural or improbable that the deceased himself might wish that another mode might be tried, or at least that he might readily acquiesce in it, and adopt it, when it was proposed to him. Mr. Wells states, in his second examination, "that according to the best of his recollection, the deceased did express his displeasure at Mr. Boodle's having refused to prepare the codicil, as well as his grief that it had not been done;" and here is the deceased's own declaration to Mr. Wells, that it had been drawn up at his request by a legal friend of Mr. Kinleside. If Mr. Kinleside had brought this codicil to the deceased so prepared, and had got it executed in his own presence, calling in some servants, or other ignorant persons to attest the mere formal execution of the instrument, it would have been very alarming indeed. Such a mode of proceeding would have savoured pretty strongly of fraudulent circumvention; but the course taken is extremely different. It is charged indeed in the plea, "that Mr. Kinle-

side having taken up his residence at Shawfield, endeavoured to persuade the deceased," and so on. The fact is, he does not take up his residence there till after the execution of this codicil, namely, in the month of May, and then not at his own suggestion, but at the request and solicitation of the deceased and Mr. Walmsley, who thought it would be for the comfort of the deceased; but Mr. Kinleside leaves the codicil in the hands of the testator;—he returns to Sussex;—and the deceased is left to execute it or not as he thinks proper. The deceased, being thus left to himself, with the codicil in his possession, naturally enough consults his friend Mr. Wells on the mode of proceeding;—states that he wishes to proceed to the execution of it; and the mode is adopted which is set forth in the deposition of Mr. Wells.—The deceased's manner of going through the several steps towards the execution is strongly indicative of mind, memory, and understanding: he conducts those steps himself;—and as to tutoring an old man who had lost his understanding and memory, to go through the whole of this in the way I am about to state, it is not only unsupported by any proof, but it appears to me quite an extravagant supposition.

The deceased was recommended by Mr. Latter to make a copy of the codicil; and he does accordingly make a copy, which is the best possible evidence that he understood and approved the contents of that instrument, supposing he had any degree of capacity at this time. Here Taylor again is called in, and he suggests that the copy was made by the intervention of Mrs. Jukes's

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assistance: he states, "that he very well remembers that he saw the deceased on two or three different days in April, 1814, copying from a paper before him:—what it was he did not see; he knows that the deceased had great difficulty in copying it, for the respondent was called upon by Mrs. Jukes to administer valerian to him, while about it: and in going in and out of the room, he saw Mrs. Jukes assisting the deceased, taking care that he had not too much ink in his pen, and pointing to the lines from which he was copying. The respondent thinks that the deceased could not by any means have written the paper without assistance." Such is the opinion of Taylor: his opinion is, that the deceased was utterly incapable, from the middle of the year 1812;—So that as to these facts, the Court cannot very safely rely on his testimony: but supposing he were correct in this statement, what does it amount to but this, that this old lady looked to see that he had not too much ink in his pen, and that she pointed out the lines from which he was copying? Now the story itself, I think, of the necessity of this assistance, is not very probable, when we recollect that the deceased was able to write these different letters of the 3d of March, 1814, and in January, 1815; and keeps his books of account, and endorses his bills during the whole year: it is not likely that Taylor has formed a just opinion; but if he did receive assistance to this extent, it would not go to invalidate the knowledge of the deceased of the contents of the instrument, or his capacity to judge

of the nature of the contents. But here again Mrs. Jukes solemnly deposes, she knew nothing about the copying of this codicil; and bad as her memory is, she thinks it impossible but she must have recollected so striking a circumstance if it ever happened.

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The fact, however, is, that one copy of the codicil is in the deceased's own hand-writing: the deceased himself applies to two of the witnesses. Mr. Latter is desired to attend by Mr. Wells: and who are the witnesses called in? Not ignorant persons—not persons to witness a mere formal execution—not persons likely to be parties in a fraud, or to have a fraud imposed on them, but persons as competent to detect a fraud as could be selected—all long acquainted with the deceased—the minister of the parish, the medical attendant of the deceased, and a neighbouring solicitor, who is ordered to attend to judge of the proper form to be gone through; and they are put upon their guard to satisfy themselves of his volition and competency to do the act, and are satisfied on the occasion.

It only therefore remains, that I should state the evidence to these points. Mr. Hott says, "that a few days; perhaps three or four, before the 27th of April, the deceased called upon him, and said that in a few days he should want his assistance to see him sign a paper." He states the object of it; nothing further passed then. "On the following Monday, the 25th of April, the deceased's servant came to the deponent, requesting, in his master's name, that the deponent would meet Dr. Smith and Mr.

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Latter, at the deceased's house, at twelve o'clock on the following Wednesday." So that it is the deceased himself that engages Mr. Ilott for the purpose of attending, three or four days before the execution takes place. He then goes on to state the circumstances of the execution. "At the appointed time he went to the deceased's house, and found there Dr. Smith, Mr. Latter, and Mr. Wells. When he entered, the deceased shook hands with him, and said he was very glad to see him. Mr. Latter asked the deceased to state for what purpose they were assembled, to which the deceased replied, that he wished to make some alterations in his will, for they had robbed him of thousands. Mr. Latter asked him whom he meant, and he said, Paul Malin and Benjamin Harrison. There were two papers lying on the table, one of which the deceased took into his hand; the deceased then gave one of the papers to Mr. Latter, who was requested to read it aloud, which he did slowly and distinctly; that he stopped occasionally, when the deceased expressed his approbation; and when read through, the deceased expressed his approbation of the whole; he then executed it, and the witnesses signed their names. When the business was finished, the deceased thanked them, and said, Now I am happy; and he appeared well pleased and satisfied.

Dr. Smith says, that on Monday, the 25th of April, 1814, the deponent called with the churchwardens of Bromley, and when they had settled their business, the churchwardens took their leave, and the deponent was about to do the same, when

the deceased stopped him and said, "I shall be glad to see you here some day this week that is convenient to you." Here again is spontaneous acting from the deceased shewing understanding and foresight—not the least appearance of any loss or defect of memory: indeed this circumstance is in some degree confirmed by the entry in his book of accounts, for here are two guineas entered this day, as paid to Dr. Smith for Easter Offerings. He goes on to state, "the deceased said to him, I have been very ill used, Dr. Smith, and I want to make an alteration in my will, for I intend to take the administration of my affairs out of the hands of my executors, and give it to others; the deceased then also mentioned the names of his executors, Mr. Paul Malin and Mr. Benjamin Harrison, saying, they shall have nothing to do with my affairs, and indeed the will was not my will, for it was done by the persuasion of my brother, but now he is gone, I intend to make my own will: no day was fixed for the deponent to come, but the deceased said, I will let you know in time, and they then parted." Here he tells the witness the purpose for which he wants him—that it was to alter the will: he mentions the nature of the alteration, and whom he meant to remove; it was to remove Mr. Paul Malin and Mr. Benjamin Harrison; and it might be true, in some degree, that it was to gratify his brother that he was induced to make the former disposition: but, however, we must not rely too much either as to the sincerity of the statement, or the accuracy of recollection of the person relating the conversation. Dr. Smith goes

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on to state, " that on the following Wednesday, by appointment, he went and found the deceased and Mrs. Jukes in the parlour together alone: they talked upon indifferent subjects for a short time, when Mr. Latter, Mr. Ilott, and Mr. Wells, having arrived; Mrs. Jukes left the room, and the deponent then said to the deceased, Pray, Sir, what might you be wanting with us? he replied, I want to make an alteration in my will; he added, that he had lost thousands, and he intended that his executors should have nothing to do with the administration of his will; whether he mentioned their names or not, the deponent does not remember with certainty: the deponent asked who he intended to make his executor. The deceased taking some papers out of a drawer, said, I mean to appoint this, pointing to the name of Mr. Kinleside;" perfectly, therefore, recollecting the appointment he had made with this gentleman—the object of it, and the alterations he was now proposing to make, and his reason for so doing. The witness then speaks of the reading over, and asking the deceased's approbation of the codicil, he says, " he proposed that the codicil should be read over to the deceased, and one copy was handed to Mr. Latter, and another to the deceased for that purpose: when Mr. Latter had got a little way in reading it, the deponent stopped him, by asking the deceased if he heard it; the deceased said, yes, Sir, I hear very well. Mr. Latter then proceeded, stopping occasionally to ask the deceased his approbation, who said each time, that is right, and gave his consent to every part. The deponent remembers that the



deceased had in his own copy made a reiteration of two or three short words, which being pointed out to him, he himself took a pen and crossed them out ;” and they are very short words, merely from mistaking the catch-word, he has inserted “ *me, in, or by,*” twice over ; indeed, the date is inserted in his hand-writing, and as none of the witnesses mention that to have passed during the time they were present, it is another mark of the deceased’s memory and recollection that he filled it up before their arrival, in order to prepare the instrument for execution.

Dr. Smith then states the execution and the attestation ; and he adds, “ that the deceased said, when he had done, Now I am easy and satisfied.”

Mr. Latter gives the same account ; he confirms Mr. Wells’s application to him—his recommending the deceased to make a copy of the codicil, and also his making an appointment for the execution—his afterwards attending the deceased—shaking hands with him, and a little common conversation when Mrs. Jukes left the room ; and that the deceased then began by saying, “ the reason for my sending for you, gentlemen, is to witness an alteration I wish to make in my will.” Some papers were then lying on the table—he said, “ I have written this from a copy which a lawyer in London wrote for me to sign.” I have already noticed, that if the witness is accurate as to this expression of the deceased, the deceased might not know it was drawn at Arundel, for it is subsequent to this time that Mr. Wells is apprised of that fact. “ Dr. Smith then asked him, what was the main point of

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the intended alteration? the deceased, holding one of the papers, being one part of the intended codicil, in his hand, said, pointing to some lines in it, I wish to exclude these persons from my will: the deponent asked what persons; he said, Paul Malin and Benjamin Harrison: Dr. Smith asked, in that case, who do you wish to be your heir? he answered the Rev. William Kinleside, pointing, at the same time, lower down the paper." Now here is no symptom of want of memory, or want of understanding or disposing mind, or any importunity used on the occasion. The witness then speaks to the paper being read—the deceased's approbation of it, clause by clause—his little alterations—and the attestation of it; and he concludes with these words, "that the deceased thanked them several times for the trouble they had taken, and said he should now be satisfied and easy, as he had signed *Mr. Boodle's* paper."

Now this has been noticed, but really it is quite a trivial circumstance; it might be a misapprehension of the witness, for he had been informed by Mr. Wells that Mr. Boodle had been present on former occasions; or it might be a lapse of memory in the deceased making use of one name for another; for it was natural enough Mr. Boodle's name should be in the mind of the deceased on this occasion after the former transactions; but suppose his mind began to falter or wander, it was at the conclusion of the transaction, and would not affect the validity of it: indeed it does not create any doubt in the mind of the witness himself; for he goes on to de-

pose in the strongest terms to the capacity of the deceased: he says, "he was more than usually careful to ascertain the state of the deceased's faculties, and his capacity to make the codicil, having heard it said that he was at times weak in his intellects; and that he can and does, without the least hesitation or doubt, depose that the deceased was, at and during the whole time that he was with him, which was for the space of about an hour, in full and entire possession of his mental faculties; he was of sound mind, and in every respect perfectly capable of making and executing a codicil, or of doing any act of that nature; he knew as well what he was about as any person present, as the deponent verily believes."

Mr. Ilott deposes to the capacity in these terms: "The deponent has seen the deceased on some occasions when his memory failed, but on this day there was not the least appearance of any thing of the kind; on the contrary, he enjoyed the full possession of his mental faculties, and the deponent did not, and does not, entertain the least doubt of his being in a fit state to execute a will or codicil."

Dr. Smith also deposes in terms no less strong: "That during the whole time, the deceased was, as the deponent verily believes, as perfectly in his senses as any man living; he was certainly of sound and disposing mind, memory, and understanding; well knew and understood what he said and did, and what was said and done in his presence, and was fully capable of making and executing a codicil to his will."

In a transaction so conducted by intelligent wit-

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nesses put upon their guard to observe carefully the state and condition of the deceased, the terms in which they express their opinion as to the capacity is not wholly immaterial, and they speak in the firmest manner to their opinion ; but the Court relies much more on the facts which they state than upon any opinion which they can give, and which prove to me most fully that the deceased acted freely and spontaneously on the occasion—that he conducted the whole transaction rationally ;—that he well understood what he was doing ;—that he fully remembered the grounds on which he acted ;—and that he had a perfect and disposing mind. Mr. Wells was present upon the occasion, and fully confirms the subscribing witnesses : he was present as a friend, and at the earnest request of the deceased himself ; but he takes no part whatever in conducting the business, all that is left to the deceased. Now, if what the under gardener states be correctly true, “ that in ten minutes after the gentlemen were gone he saw the deceased crying, muttering to himself, and shaking his hands backwards and forwards, and that he seemed very much distressed ;” or what Peebles says,—“ that in the evening he saw the deceased at the door of the hot-house in the garden which he opened, and asked him if he wanted any thing, for he appeared to be looking about him rather oddly, and did not speak to him ; but came into the hot-house, and put his hands together as if in distress, and said, oh, that man, that man ! almost crying at the time, and appearing to be very much disturbed.” If this be true, it is of

very little weight as to the validity of the instrument which was thus executed. The exertion and anxiety of going through such a transaction as this, after the former failure, would be likely to leave him in a very nervous state, and the irritation he felt at what he considered (I am not saying rightly or wrongly) the ingratitude of Mr. Benjamin Harrison was very likely to lead him to give loose to these expressions, and to make this exclamation; but Mr. Wells says, "on subsequent occasions he recognized the act, that while he was walking in Shawfield Garden, the deceased expressed his satisfaction that that house and those premises would come to Mr. Kinleside. He believes that the deceased frequently expressed himself to the same effect; and that from the time of the execution he was generally as happy and comfortable as he had before been disquieted and wretched."

The deceased lived nearly two years afterwards in the management of his own concerns, keeping his own accounts occasionally, and writing letters, receiving and conversing with his friends, and playing his rubbers at whist with them as well as ever.

Upon the whole then of the circumstances of this case, I must proceed to pronounce for the validity of these codicils, and which I pronounce with a firm moral conviction on my mind, that the Court will be giving effect to the wishes and intentions of a capable testator.

There is one point however that still remains, which has been a good deal pressed in argument,

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and upon which alone I have entertained considerable doubts; and upon that point I confess I have entertained considerable doubts.—It is the question of costs.

It is the duty of the Court to repress vexatious litigation as well as malicious charges; and if satisfied that those grounds for costs exist in this case, the Court will be bound not to shrink from the discharge of its duty. Mr. Benjamin Harrison was irritated at those imputations that had been made against him in respect to Mr. Malin's affairs; he was perhaps disappointed at the revocation of the benefits intended him under the will; his mind was therefore prepared to receive, and, I do think, that he has lent rather too ready an ear to stories brought to him of the deceased's incapacity, of false and fraudulent excitements, and of iniquitous proceedings. But though he was incautious in allowing himself to give way to such suspicions, yet it must be recollected that these transactions took place after he had left Widmore, and as the law terms it, "behind his back;" and it must more especially be recollected, that upon three different interviews a most respectable solicitor, the confidential solicitor of the deceased, was of opinion that the deceased was not at those times possessed of a testamentary capacity; and when it is still further recollected that it is through the agency of the person benefited that the instrument is drawn up, by his own solicitor, who had not access to the deceased for the purpose of taking the instructions:—Under all these circumstances it is rather too much, I think, for the Court to

conclude that Mr. Benjamin Harrison may not sincerely have believed the truth of the case which he set up in his allegation.

It was pressed upon the Court that the line of argument assumed by counsel rather tended to shew a continuance of that same sort of feeling on the part of Mr. Benjamin Harrison ; this, I must say, would be a very dangerous ground for costs. The interests of justice are involved in the free discussion of cases at the bar ; this would be much checked if such a circumstance were made the foundation of costs. The Court highly applauds and strongly recommends the observance of a liberal and honourable forbearance, even towards adverse parties, and still more towards respectable witnesses who may be under the necessity, and as matter of duty are bound to give evidence ; but the Court can at the same time with truth and great satisfaction declare, that in no tribunal is that liberal forbearance more attended to than in these Courts ; it is due to the learned advocates in this case, more particularly pointed at, to say, that the attack did not appear to be wantonly made, nor were the observations pushed beyond the fair limits of free discussion. The pressure of the case required them to endeavour to take off the effect and weight of the evidence of this witness, in order to set up the credit of that witness on whom the Court has repeatedly declared it cannot place any reliance ; and this gentleman himself, I am sure, is too liberal and enlightened to feel permanently hurt at any thing which took place in the cause. At all events it is my duty to repeat, there is nothing

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in my judgment which attaches any sort of dishonourable reflection upon his character or conduct in these transactions, or upon the perfect integrity with which he has given evidence in the cause ; but taking all the circumstances together into my consideration, I do not think this is a case in which I am called upon to give costs.





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May 1.



DENNY v. BARTON and RASHLEIGH.

**W**ILLIAM HARRIS of New Alresford, in Hampshire, died in May, 1817, possessed of about 24,000*l.* personal property, leaving a will dated 13th of March, 1812, and a codicil of the 26th of October, 1815.—Probate of both these instruments was granted in common form in July, 1817, to Charles Barton and Jonathan Rashleigh, two of the executors named in them.

A letter established as a codicil to a will of a date subsequent to the letter.

A second codicil was now propounded in an allegation by Louisa Denny, a natural daughter of the deceased—the codicil was in the shape of a letter dated in June, 1808, and addressed and endorsed as follows :—“ *To Joseph Leacock, Esq. not to be opened until after the death of William Harris, Esq.*” Joseph Leacock was a nephew of the deceased’s, and the residuary legatee and one of the executors under the will which had been proved ; but he was in the West Indies at the time of his uncle’s death ;—and had died before he had arrived in England—in the will there was a clause revocatory of all former wills.

The letter was as follows :—

“ My dear Joe.—I find I am not long for this world ; and shall, therefore, disclose to you a secret which is known to very few, though Mrs. Harris is acquainted with it. I have a natural daughter,

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by the name of Louisa Denny, who is now a teacher at a lady's boarding school, at Hampstead : the name of the governess who keeps the school is Scriven. I have bred up this girl with care and attention, and have given her a good education. I have not mentioned her in my will, because the world should not know of my indiscretion ; but I desire you (to whom I have left all my property) to pay within six months after my decease, to this young lady, one thousand pounds sterling, or allow her an annuity of fifty pounds per annum, from the day of my death. I further desire you will pay to her mother, whose name is Sarah Whitear, living in East street, in the town of Alresford, with her mother as a mantua-maker, an annuity of twenty-five pounds per annum, from the day of my decease, in quarterly payments. I have always found you to be a good lad ; and I trust, as a man of honour, you will attend and follow the directions I have here given you, in the same manner as though contained in my will. My friend, Captain Sealy, who lives at No. 19, Guildford street, will give you further information respecting Louisa. God bless you, my dear Joe. I am your sincere friend and affectionate uncle, WILLIAM HARRIS.

" P. S.—I have a little money in the three per cent consolidated funds which will enable you to discharge the above legacy and annuity.

June, 1808."

*Phillimore and Dodson in opposition to the codicil.*

*Swabey and Lushington in support of it.*

## JUDGMENT.

SIR JOHN NICHOLL.

There is no doubt in this case.—The codicil is in the form of a letter : but it is quite clear that the deceased intended it to be a confidential trust to his nephew not to be communicated till after his death.—It was intended to operate independently of his will. I should not consider it irrevocable ; but I think a will with a common revocatory clause would not revoke this paper.—There have been a variety of instances in which papers of this sort have been admitted to probate.—It was found uncanceled and unrevoked ; and it has only been in consequence of the nephew's death that it has been necessary to bring it before the Court.

I am clearly of opinion that it can operate ; and that it was not intended to be revoked, notwithstanding the revocatory clause in the will ; and, therefore, I admit the allegation.

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*May 27.*  


ABBOTT v. ABBOTT.

Where there has been an administration pendente minore ætate, and the minor coming of age takes upon herself the administration, she is obliged to give security to the same amount that the administrator did in the first instance.

## JUDGMENT.

SIR JOHN NICHOLL.

This is a point of some importance both with respect to our practice and to the public. Richard Abbott died in February, 1816. On the 30th of March, 1816, his widow took out administration in the ordinary course, stating the effects to be under 5,000*l.*. She and her father were securities.—Several actions were brought by creditors against her, and verdicts obtained.—On the 22nd of April, 1817, she brings in the administration, declaring she was a minor when it was granted, and that she still continues a minor ; and her father takes it out during her minority for her use and benefit, swearing the property to be under 3,000*l.* How this could be I cannot understand : but the widow comes of age, and a citation is taken out against her by a creditor ; and she is called upon to exhibit inventories. Inventories are exhibited which make the property about 5,100*l.* The widow now prays administration, taking the oath that the effects are under 100*l.* It is quite clear that the amount of goods at present does not affect the stamp duties ;—by the last act of parliament the second administration is taken

on the same stamp with the first ; therefore, this is so far immaterial to the parties.

It is objected on the part of Mr. Abbott that the security is not sufficient in 100*l.*; that in effect it is the continuation of the same administration.—In ordinary cases there is no priority between two administrators.—In the case of a temporary administration the first administrator is the representative of the regular administrator ; he is only his attorney and agent : the bond then must be in a different form from that in which the administratrix comes in her own right to all the goods and chattels of the deceased.

It is alleged that the widow could not now maintain an action against the other who may be termed the temporary administrator. She takes it on the original stamp ; and the only question is one of security whether she should not take it to the whole amount. The administrator may not have administered rightly ;—and how are the creditors to call him to account, or he them through her ? The creditors are primarily interested in the bond ; they are to be paid before legatees or next of kin ; it is of high importance to them that the security should be good and ample.

On the part of the widow it is alleged that the deceased was a tavern keeper ; that he left property to the amount of 5,000*l.*, and debts to the amount of 16,000*l.* ; that all the effects were duly administered by her and her father respectively, except £50. 2*s.* 11*d.* ; and she prays administration under 100*l.* She and her father I have on doubt understand each other well as to this insolvent estate.

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Lord Mansfield said (a), "that no next of kin ever struggled for the administration of an insolvent estate with an honest view."

Perhaps we might apply the words of Lord Mansfield to the present case:—when the property amounts to 5,000*l.*, and the debts to 16,000*l.*, why is this widow so anxious for the administration? What purpose she can have I know not; she can hardly have an honest purpose. The Court cannot investigate these accounts; cannot say whether she has given an improper preference; cannot examine whether they are fraudulent or fair.—What is the Court to do?—the practice I understand has varied, and the question only is as to the security. I can see no reason why, if the widow is so anxious about the administration, she should not renew the securities: the terms of the bond are *well and truly to administer*. And this being the nature of the bond,—can the Court take a less security than for the whole of the goods and chattels of the deceased at the time of his death. Instead of allowing the administration to go to a creditor, she and her father are trying, by every possible means, to get the administration into their own hands. The Court is bound to go as far as it can to afford protection to all who may be interested; the creditors must be primarily concerned. Let the point, however, stand over to ascertain whether there is any established practice to prevent what I incline to do, that is, to make her find security to the full value.

(a) Archbishop of Canterbury v. House, Cowper 145.

If any new circumstances should occur either to the counsel or the practitioner, I shall be happy to receive any communications from them.

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The Court took time to deliberate.

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The Court decreed the administration to Mrs. Abbott on her giving security in 6,000*l.*, and the sureties justifying.

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*June 3.*

## ARCHES COURT OF CANTERBURY.

1818.  
Easter  
Term.  
May 30.

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*An Appeal from the Consistory Court of Llandaff.*

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MORGAN v. HOPKINS.

A party not  
to be pro-  
nounced in  
contempt at  
the same time  
that his an-  
swers are held  
to be insuffi-  
cient.

**T**HIS was a suit for subtraction of tithes, brought originally by David Hopkins, the lessee of the tithes of the parish of St. Lythans, in the county of Glamorgan, against Morgan Morgan, for the subtraction of tithes. A libel having been brought in, and a negative issue given to it, the answers of the defendant were taken, these answers were objected to because they set forth a modus for the farm, but did not state the amount of it; and a decree was made for further answers. The Court assigned Hopkins to specify his objections to the answers; the objections were stated in a responsive allegation. Further answers were brought in, in which the defendant admitted that he had not set forth the articles for which the modus was payable, nor the time at which it was due, but that he had answered to the libel as far as he was required by law.

The proctor for the party promoting the suit prayed the Court to pronounce the answers insufficient, because they had not fully set forth the



modus; and that they might be rejected, and the defendant pronounced contumacious for not giving sufficient answers as decreed; and in conformity with this prayer, the Court pronounced the answers insufficient, and the party contumacious and in contempt.

From this sentence the appeal was interposed.

*Jenner and Phillimore for the appellant.*

*Swabey in support of the sentence of the Court below.*

Whether the Court below was right in the latter part of its sentence, is for the judgment of this Court: but the answers are certainly insufficient. The object of answers is to relieve the party from the necessity of proof: they should therefore clearly set forth the amount and value of the tithes, that the party may know what is demanded.

#### JUDGMENT.

SIR JOHN NICHOLL.

In considering the proceedings of the inferior jurisdictions this Court endeavours to look to the justice of the case, and is not strict as to the proceedings. But there are some irregularities, such as appear in this case, which the Court cannot overlook. Irregularities exist in many of the inferior Courts: but they are conspicuous in the Court from which this appeal is brought; there the proceedings are not carried on upon the same principles which guide us in Doctors' Commons.

The libel and schedule are regular and correct in point of form—the libel pleads the right to tithes—the schedule sets forth the tithable matter—the answers state that there is an exception on

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account of a modus for some parts of the farm, and on account of a composition for others ; and then state the value of each article, and the quantity.—The error in the Court below arises from a perfect confusion between the answers and the plea. The answers are taken from the party proceeded against to save the expense of witnesses : in many cases, especially in tithe cases, the facts are exclusively within his knowledge—there can be no other mode of proof—if the defendant has not answered to the quantity and the value, the answers are defective, and he cannot screen himself under the suggestion of a modus—this modus is no excuse for not setting forth the quantity and the value.

This is the great mistake in these proceedings—the whole nature of the answers is mistaken—the answers should not have been objected to ; they are quite full. The Court would have been bound to have decided on these answers, if they had not gone on to state a modus. The answers are good against the party : but could not be good to establish by them a modus which has now been pleaded.—The error is, they have mistaken the answers for the plea, and examined upon them—great confusion of Ecclesiastical Proceedings in the country arises from solicitors acting as proctors, and knowing nothing of the ecclesiastical law : when they come before the Superior Court, they must be set right, and not allowed to proceed. This point being brought to the view of the Court, on an appeal, I must notice it. If the cause had gone on, and come to a hearing on the merits, I should

not have turned the party round upon this irregularity, but have endeavoured to get at the justice of the case : but, coming before me on this point, I cannot assimilate our practice to that which is clearly faulty. The objection would be good against an allegation ; and the Court would reject it for the reasons stated. It is objected that it is necessary to admit them in order that the party may traverse :—but how is it possible to traverse answers ? The assignation is for further answers : but this appears to have been waived, for there is a subsequent assignation upon him to state his objections in writing—the mode in which this has been done, is by an allegation, which is extraordinary. I believe the ancient practice was to give acts on petition exceptive to answers, but never an allegation. A decree in this case was made for answers, which were given ;—they were objected to, and an assignation was made to hear on them. The Court decreed these in this instance to be insufficient ; and at once pronounced the party to be in contumacy and contempt, and decreed him to be signified—this is a strange proceeding. I should like the counsel to have stated where is the contempt. It is impossible for a moment to consider these proceedings as such as can be affirmed and justified.

I have no doubt in pronouncing for the appeal : my only difficulty is as to costs. The error seems to have arisen from the course of proceedings in the Court below. If all these suits for small tithes are to be sent here by letters of request, it will be burthensome to this Court, and burthensome to the inhabitants of the diocese.

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I shall reserve the question of costs till the decision of the cause, when I shall be able to ascertain which is the litigious party.

I shall pronounce for the appeal, reverse the sentence, and retain the principal cause.

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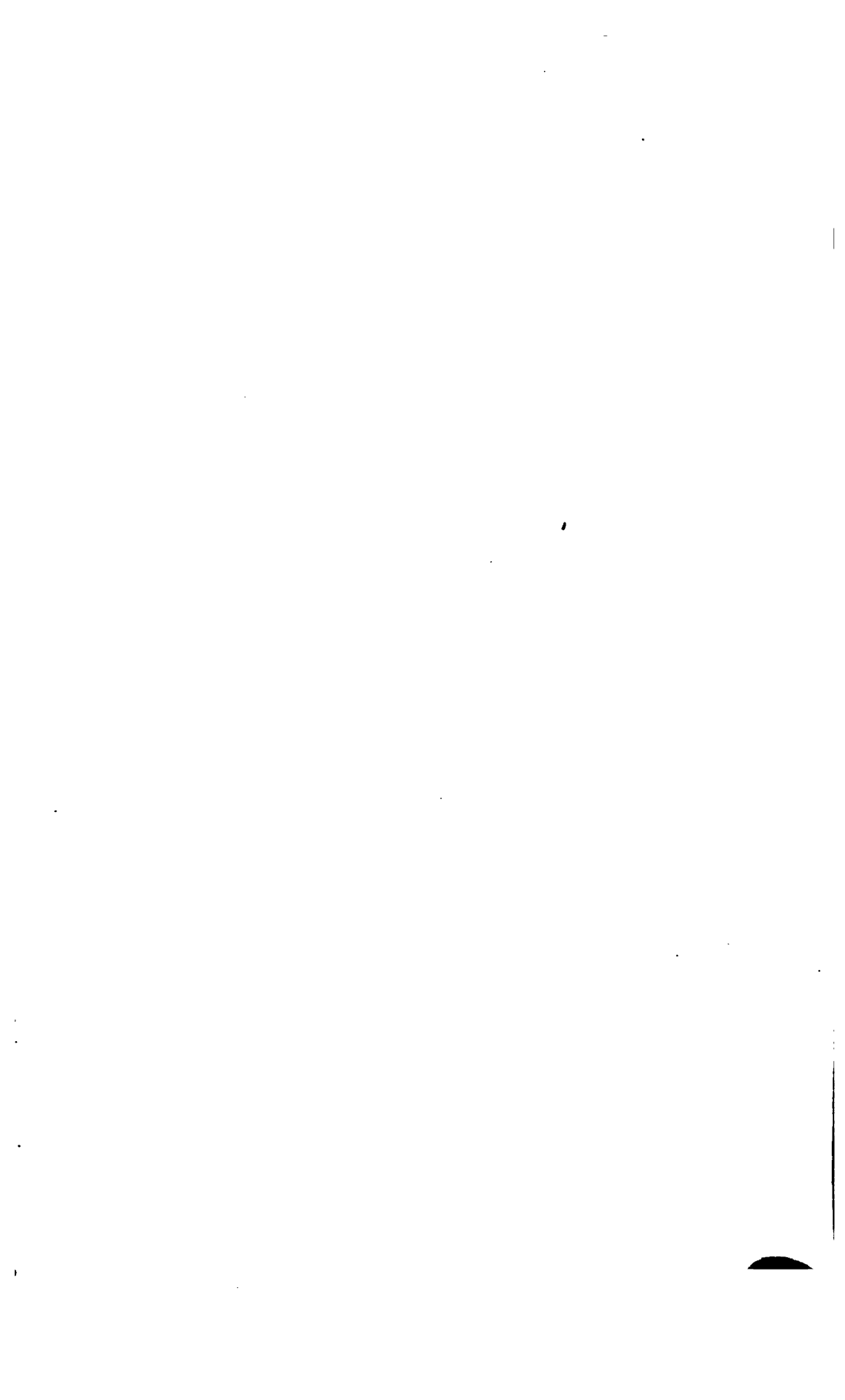
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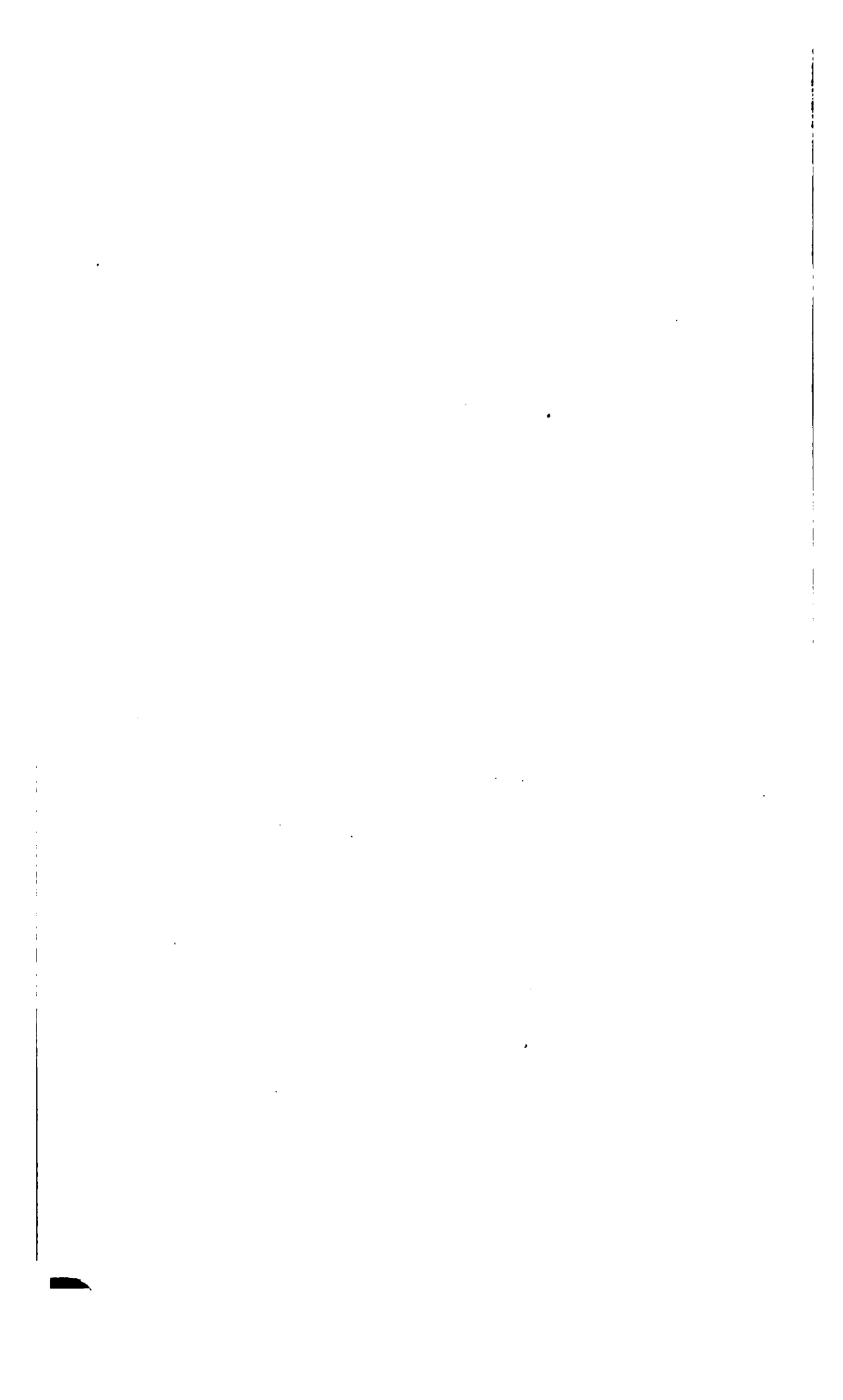


















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